FILE COPY.

Supreme Court of the United States.

No. 15 ORIGINAL.

Ex parte, THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER.

MOTION FOR LEAVE TO FILE A PETITION FOR WRITS OF PROHIBITION, MANDAMUS AND CERTIORARI TO THE JUDGES OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Office Supreme Court, U. S.
FILED
JAN 3 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

Ex parte, THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER.

MOTION OF THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO FILE A PETITION FOR A WRIT OF PROHIBITION AND FOR A WRIT OF MANDAMUS AND FOR A WRIT OF CERTIORARI TO THE JUDGES OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Now comes the Commonwealth of Massachusetts and moves that leave be granted it to file in the Supreme Court of the United States a petition for a writ of prohibition to the judges of the Supreme Court of the District of Columbia, restraining the said judges from proceeding further in a certain equity suit pending in said court, whereof said court has not jurisdiction, entitled "John B. Cotton, complainant, *v.* Leslie M. Shaw, Secretary of the Treasury, and John L. Bates, Governor of the Commonwealth of Massachusetts," numbered 25032; and for a writ of mandamus commanding the said judges to dismiss said suit; and for a writ of certiorari to bring up the record of said suit; and that a rule may be issued out of this court to the said judges commanding them, upon a day to be fixed in said rule, to show cause in this court why the said writs of prohibition, mandamus and certiorari should not issue as prayed.

HERBERT PARKER,
Attorney-General of Massachusetts.

Supreme Court of the United States.

No. October Term, 1904.

Original.

In re THE COMMONWEALTH OF MASSACHUSETTS, Petitioner.

PETITION FOR A WRIT OF PROHIBITION AND FOR A WRIT OF MANDAMUS AND FOR A WRIT OF CERTIORARI TO THE JUDGES OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States.

The petition of the Commonwealth of Massachusetts, one of the States of the United States, respectfully shows: —

1. On July 18, 1899, an agreement was entered into between Roger Wolcott, Governor of Massachusetts, acting in behalf of said Commonwealth, and John B. Cotton, of Washington, D. C., by the terms of which said Cotton was declared to be appointed agent and attorney of the Commonwealth of Massachusetts to present, prosecute and endeavor to recover before the Court of Claims, the Supreme Court of the United States and the Treasury Department of the United States a claim of the Commonwealth of Massachusetts against the United States, arising by virtue of the act approved July 27, 1861, entitled "An Act to indemnify the States for expenses incurred by them in the defence of the United States." By the terms of said agreement said Cotton

was to receive a compensation of 10 per cent. of the entire sum collected, payable only out of any sums that might be collected thereunder. Said agreement is set forth by entire copy thereof hereinafter on page 18, being a part of Exhibit B, and is made a part hereof.

2. In partial satisfaction of said claim of the Commonwealth of Massachusetts against the United States, Congress, by an act approved on the twenty-seventh day of April, 1904, appropriated to the Commonwealth of Massachusetts $1,611,740.85. Thereafter, on the second day of May, 1904, the Treasury Department of the United States issued a warrant in favor of the Governor of Massachusetts for the said sum appropriated by Congress, which was of the tenor following: —

WAR SETTLEMENT WARRANT. No. 11343.

UNITED STATES TREASURY DEPARTMENT,
WASHINGTON, D. C., May 2, 1904.

To the Treasurer of the United States.

Pay to the Governor of the State of Massachusetts, or order, one million, six hundred eleven thousand, seven hundred forty 85/100 dollars ($1,611,740.85).

C. H. KEEP,
Assistant Secretary.
R. J. TRACEWELL,
Comptroller.
C. M. FOREE,
Chief Clerk.

The Assistant Treasurer, U. S., Boston, will pay this warrant. Certificate.

J. F. MELINE,
Assistant Treasurer.

No. 25639.

P. O. Address, Ce JOHN B. COTTON, *Agent and Atty.*, Washington, D. C.

3. Immediately after the issuance of said warrant the Treasury Department of the United States, without notice to the Commonwealth of Massachusetts that said warrant had been drawn or was ready for delivery, gave said warrant to said John B. Cotton, who, on the fourth day of May 1904, notified the Commonwealth of Massachusetts of such delivery. Thereupon the Governor of Massachusetts requested from said John B. Cotton the immediate transmission of said warrant to him, but said John B. Cotton refused to deliver said warrant to the Governor of Massachusetts until a sum equal to 10 per cent. of the amount of said warrant, namely, $161,174.09, should be paid to him by the Commonwealth of Massachusetts, and wrote to the Secretary of the Treasury, the Hon. Leslie M. Shaw, a letter in which, without color of right, he claimed a lien for said amount upon the sum which had been appropriated by Congress to the Commonwealth of Massachusetts. The correspondence concerning said matter is fully set forth hereinafter at pages 27–32, and is made a part hereof.

4. Thereupon, on the twenty-fourth day of June, 1904, the Governor of Massachusetts requested the Secretary of the Treasury to cancel said warrant No. 11343 which was in the possession of and withheld by said John B. Cotton, and to deliver to him a duplicate warrant for the sum of $1,611,740.85 appropriated by Congress as aforesaid, but the Secretary of the Treasury refused to issue a duplicate warrant. Thereupon, on the fifteenth day of July, 1904, the Governor of Massachusetts suggested for the consideration of the Honorable Secretary of the Treasury that the issuance of such duplicate warrant was the Commonwealth's legal right, and requested that he take the opinion of the Attorney-General of the United States thereon. Thereafter, on the eighteenth day of said July, the Secretary of the Treasury

requested the opinion of the Attorney-General, the Hon. William H. Moody, whether the practice of the Treasury Department of delivering treasury warrants to the attorneys of successful claimants against the United States, adopted, as he said, for the purpose of protecting such attorneys from clients who are impecunious or exempt from suit, was authorized by law.

Copies of the correspondence here referred to are set forth hereinafter on pages 9–11, as Exhibit A, 1 to 4, inclusive, and are made a part hereof.

5. The Attorney-General of the United States, on or about the eighteenth day of November, 1904, as your petitioner is informed and believes, advised the Secretary of the Treasury that the delivery of said warrant to said John B. Cotton was unauthorized, and that it was the Secretary's legal duty to issue to the Governor of Massachusetts a duplicate warrant for $1,611,740.85 in payment of the appropriation by Congress as aforesaid.

6. Immediately thereafter, on the eighteenth day of said November, the said John B. Cotton filed in the Supreme Court of the District of Columbia a bill in equity, No. 25032, in which Leslie M. Shaw, Secretary of the Treasury, and John L. Bates, Governor of the Commonwealth of Massachusetts, are named as defendants, alleging that the Secretary is about to issue and deliver to the Governor of Massachusetts a duplicate warrant for said amount, claiming a lien upon the whole amount appropriated by Congress as aforesaid, for the payment to him of ten per cent. thereof, alleged to be due him under said agreement, and praying that the Secretary of the Treasury be enjoined from cancelling said warrant No. 11343, and issuing to John L. Bates or any other person a duplicate warrant in satisfaction of said appropriation by Congress to the Commonwealth of

Massachusetts, and that John L. Bates be enjoined from asking, demanding or receiving from said Leslie M. Shaw, or any of his assistants, subordinates or clerks, a duplicate warrant as aforesaid. A copy of said bill in equity, with its exhibits, is annexed hereto, marked Exhibit B, and made a part hereof.

7. The Supreme Court of the District of Columbia, under the laws and Constitution of the United States, has no jurisdiction in said cause to make any decree between said John B. Cotton and said Leslie M. Shaw, Secretary of the Treasury, concerning the payment of said appropriation by Congress in behalf of the Commonwealth of Massachusetts, since the rights of the Commonwealth of Massachusetts must necessarily be affected by such decree, and the Commonwealth of Massachusetts, by virtue of the Constitution of the United States, and particularly the Eleventh Amendment thereof, cannot become subject to the jurisdiction of said court. Yet the said court has nevertheless, in violation of the laws and Constitution of the United States, asserted and attempted to exercise jurisdiction in the premises by issuing on the eighteenth day of November last a rule to said Secretary of the Treasury and the Governor of Massachusetts commanding them to show cause why they should not be permanently enjoined according to the prayers of said bill and by retaining said suit for consideration, so that said suit is still pending in said court. No service upon the Governor of Massachusetts was made or attempted, and neither the Governor nor the Commonwealth of Massachusetts has appeared in said suit for any purpose. Upon the return day of said rule, hearing thereon was indefinitely postponed.

Whereby the Commonwealth of Massachusetts is continually injured and has no other adequate remedy than to

remove by mandate of this court the unlawful obstruction created by the unlawful assumption of jurisdiction by the respondents, which prevents the Secretary of the Treasury from fulfilling his legal duty in the premises as he is advised by the Attorney-General of the United States.

Wherefore, the Commonwealth of Massachusetts, the aid of this honorable court most respectfully requesting, prays remedy by writ of certiorari to be issued out of this honorable court to the Judges of the Supreme Court of the District of Columbia, to be directed, requiring them to return to this court a perfect record of all their proceedings in relation to said suit, and by writ of prohibition to said judges to prohibit them from holding the cause aforesaid further before them, and to prohibit them from taking any steps whatsoever in the cause aforesaid, and prohibiting them from making or entering any order, judgment or decree in said cause, and generally from the further exercise of jurisdiction in said cause or the enforcing of any order, judgment or decree made under cover thereof, and by writ of mandamus to said judges to command them to dismiss said suit.

THE COMMONWEALTH OF MASSACHUSETTS,

HERBERT PARKER,
Attorney-General,

FREDERICK H. NASH,
Assistant Attorney-General,
Of Counsel.

BOSTON, MASS., Dec. 17, 1904.

I do solemnly swear that I have read the annexed petition of the Commonwealth of Massachusetts and am familiar with the contents thereof, and that the facts therein stated are true, and that the facts therein stated on information and belief I verily believe to be true.

FREDERICK H. NASH.

Subscribed and sworn to before me, this seventeenth day of December, A.D. 1904.

LOUIS H. FREESE,
Justice of the Peace.

COMMONWEALTH OF MASSACHUSETTS,
OFFICE OF THE SECRETARY, BOSTON, Dec. 15, 1904.

I hereby certify, that on the second day of April 1902, Louis H. Freese was appointed and commissioned, and on the third day of April, 1902, was duly qualified as a justice of the peace, for the said Commonwealth, for the term of seven years from the date of said commission: and that to his acts and attestations, as such, full faith and credit are and ought to be given in and out of Court: that as such justice of the peace he is by law authorized to administer oaths, take depositions and acknowledgments of deeds and other instruments throughout the Commonwealth.

In testimony of which, I have hereunto affixed the great seal of the Commonwealth, on the day of the date first above written.

(Seal of the Commonwealth.)

WM. M. OLIN,
Secretary of the Commonwealth.

EXHIBIT A–1.

EXECUTIVE DEPARTMENT, BOSTON, June 24, 1904.

Hon. L. M. SHAW, *Secretary of the Treasury, Washington, D. C.*

SIR: — Having been advised that, pursuant to an appropriation of Congress in the deficiency act of April 27, 1904, war warrant No. 11343, dated May 2, 1904, was drawn on the treasury of the United States and made payable to the Governor of the State of Massachusetts, or his order, for the sum of $1,611,740.85, I have the honor to inform you that such warrant has never been received by the Governor of this Commonwealth. I am further advised that such warrant was delivered by the Treasury Department of the United States to John B. Cotton, Esq., of Washington, representing himself to be the agent and attorney of this Commonwealth. Mr. Cotton informs me also that the warrant is in his possession, and that he declines to make delivery of the same to me, or to the accredited officers of this Commonwealth, until a claim which he asserts shall have been met or satisfied. I do not now discuss or consider the merit or right of such claim, for I do not deem it of significance as affecting or staying the right of this Commonwealth to payment by the federal government of the amount appropriated by Congress.

I have the honor, therefore, to request that payment upon the warrant already drawn be stopped, that the warrant itself be cancelled, and that you will forward to me, as Governor of this Commonwealth, a duplicate thereof.

I have the honor to be,

Yours respectfully,

JOHN L. BATES.

EXHIBIT A–2.

TREASURY DEPARTMENT, WASHINGTON, July 2, 1904.

MY DEAR SIR: — I have gone over the matter referred to in your letter of June 14, and do not see my way clear to grant your request. Mr. Cotton has filed with the Department an agreement

regular in form and which appears to be genuine. In the preamble of the agreement it is recited that the Commonwealth of Massachusetts "is about to present to the Treasury Department its claim," etc. In the agreement Mr. Cotton is made "its agent and attorney to present, prosecute and recover the claim." As a matter of fact, Mr. Cotton did present the claim and did recover the warrant. The warrant is payable to the Governor of Massachusetts and can only be paid on his endorsement.

The situation then appears to be as follows: the agent of the Commonwealth of Massachusetts holds in his possession a warrant payable only on the Governor's endorsement, which he now refuses to surrender. Being authorized to recover, the delivery of the warrant to the regularly constituted agent of the Commonwealth appears to be regular and fully authorized. Being thus regular and authorized, and the warrant unlost, as I am now advised, I see no excuse or justification for issuing a duplicate. If I am in error in my analysis I shall be very glad to hear from you.

Very truly yours,

L. M. Shaw.

Hon. John L. Bates, Boston, Mass

Exhibit A–3.

Executive Department, Boston, July 15, 1904.

Hon Leslie M. Shaw, *Secretary of the Treasury, Washington, D. C.*

Sir: — An enforced absence has delayed a more immediate reply to your letter of July 2 in reply to my letter of the 14th of June. From intimations contained in your letter, I am led to believe that some essential propositions involved in my request have not been fully presented for your consideration. I am advised that the issuance of the warrant, in accordance with my request, is a matter of right and of law. If upon full consideration you are in doubt as to acceding to the request, I venture to hope that you will have the kindness to refer the matter to the Attorney-General, before whom, if he so desires, the position of the Commonwealth in this regard will be fully set forth.

Yours respectfully,

John L. Bates.

EXHIBIT A–4.

TREASURY DEPARTMENT, WASHINGTON, July 18, 1904.

MY DEAR SIR: — On the eighteenth day of July, 1899, the Commonwealth of Massachusetts, through its Chief Executive, Hon. Roger Wolcott, made a contract with Mr. John B. Cotton for the prosecution and collection of a certain claim against the United States, growing out of expenditures at the time of the civil war. I enclose you herewith a copy of the contract, which was duly filed with this Department. Subsequently the claim was adjusted, an appropriation by Congress made, and a warrant issued. It has been the custom of the Department for many years to make all warrants payable to the claimants, and deliver them to the regularly authorized attorneys for the claimants. In this way the Department protects both the claimants and the attorneys. Private claimants against the Government are frequently impecunious, and others are exempt by law from civil suits, and if the Department were to deliver the warrants direct to the claimants, the attorneys would be remediless. Accordingly, a warrant for $1,611,740.85 was drawn, payable to the Governor of Massachusetts, and delivered to John B. Cotton.

The question I desire to ask is whether the practice is authorized, and, particularly, whether in the instance of the Commonwealth of Massachusetts the delivery of the warrant to Mr. John B. Cotton was authorized under the contract. In other words, was the delivery to Mr. Cotton of the warrant, payable to the order of the Governor of the Commonwealth, a good and legal delivery?

Very truly yours,

L. M. SHAW.

The Honorable the Attorney-General.

Exhibit B.

[Filed Nov. 18, 1904. J. R. Young, *Clerk*.]

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

The day of August, A.D. 1904.

In Equity, No. 25032.
Doc. 56.

John B. Cotton, *Complainant*,

v.

Leslie M. Shaw, *Secretary of the Treasury*, and John L. Bates, *Governor of the Commonwealth of Massachusetts*.

To the Supreme Court of the District of Columbia, holding an Equity Court.

The complainant states as follows: —

1. Your complainant, John B. Cotton, is a citizen and resident of the District of Columbia, and brings this suit in his own right for and because of the matters and things hereinafter set forth.

2. The defendant, Leslie M. Shaw, is a citizen of Iowa now residing in the District of Columbia, and is the Secretary of the Treasury of the United States, and is sued herein for and on account of certain acts which he threatens to perform in his official capacity as such Secretary of the Treasury, but for which threatened acts there is no authority or warrant in law.

The defendant, John L. Bates, is a citizen of the Commonwealth of Massachusetts, a resident of said Commonwealth and is the Governor thereof, and is sued herein because of the matters and things hereinafter set forth.

3. Your complainant is an attorney at law by education, profession and practice, having been admitted to the bar of the Supreme Judicial Court of the State of Maine in the year 1866 and continued thereafter in active practice of such profession in and before the courts of that State until some time in the year 1869, when he was nominated by the President of the United States as an Assistant Attorney-General of the United States, and such nomination having been confirmed by the Senate of the United States, complainant in said year came to the city of Washington in the District of Columbia and as such Assistant Attorney-General was assigned to and assumed charge of the business of the United States pending before the Court of Claims and on appeal therefrom to the Supreme Court of the United States, and continued to discharge the duties of his said office until some time in the year 1893, when he resigned his said office and entered upon the general practice of the law in the District of Columbia, having prior to said date been duly admitted to practice before the various courts of law sitting in said District and the various departments of the government located therein, and has continued in such general practice until the present time.

4. By an act of the Congress of the United States approved July 27, 1861 (12 Stats. L. 276), it was provided: —

> That the Secretary of the Treasury be, and he is hereby, directed, out of any money in the treasury not otherwise appropriated, to pay to the Governor of any State or to his duly authorized agents the costs, charges and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers, to be filed and passed upon by the proper accounting officers of the treasury.

and the intent and meaning of said act was by a subsequent resolution of Congress, approved March 8, 1862 (12 Stats. L. 615), declared to be as follows: —

> That the said act shall be construed to apply to expenses incurred as well after as before the date of the approval thereof.

5. The Commonwealth of Massachusetts having properly incurred certain costs, charges and expenses in enrolling, subsisting, clothing, supplying, arming, equipping, paying and transporting its troops engaged in aiding to suppress the insurrection against the United States between the years 1861 and 1865, and having a claim therefore against the United States under the statutes aforesaid, which claim had not been paid and was not even in course of adjustment, the proper officers of said Commonwealth in or about the year 1899 considered at length the propriety of employing counsel to press such claim against the United States for payment, said officers having full power and authority to make such employment and to contract with the person so employed as to the amount of his compensation and the manner of his payment. And thereafter the Hon. Hosea M. Knowlton, then Attorney-General of said Commonwealth, having first come to the city of Washington and advised himself fully in the premises on the fourth day of March, A.D. 1899, wrote to the Hon. Roger Wolcott, then Governor of said Commonwealth, in reference to said claim as follows: —

> . . . I recommend that this office be instructed to see what arrangements can be made with Mr. Cotton for the conduct of the claim of the Commonwealth before the Court of Claims in Washington.

The "Mr. Cotton" referred to in said letter being your complainant.

And thereafter, in pursuance of such recommendation, on the twelfth day of July, 1899, Hon. E. F. Hamlin, Executive Secretary of the Legislative Council of the Commonwealth, wrote to said Attorney-General Knowlton as follows: —

COMMONWEALTH OF MASSACHUSETTS,
COUNCIL CHAMBER, BOSTON, July 12, 1899.

Hon. H. M. KNOWLTON, *Attorney-General, State House, Boston.*

DEAR SIR: — I have the honor to inform you that at a meeting of the Executive Council held this day it was voted that the Attorney-General be authorized to employ Mr. John B. Cotton of Washington to represent the Commonwealth in the prosecution of certain claims for interest money paid by the Commonwealth for loans incurred to meet the expenses of raising troops for the war of the rebellion. The compensation for such employment not to exceed 10 per cent. of the amount collected.

Very truly yours,

E. F. HAMLIN,
Executive Secretary.

The minutes of the meeting of said Legislative Council, held on said twelfth day of July, 1899, contains the following: —

It was voted that the Attorney-General be authorized to employ John B. Cotton of Washington, D. C., to represent this Commonwealth in the prosecution of certain claims for interest money paid by the Commonwealth for loans incurred to meet the expenses of raising troops for the war of the rebellion. The compensation for such employment not to exceed 10 per cent. of the amount collected.

Thereafter, on the fifteenth day of July, A.D. 1899, said Attorney-General Knowlton wrote to your complainant as follows: —

COMMONWEALTH OF MASSACHUSETTS.
OFFICE OF THE ATTORNEY-GENERAL, BOSTON, July 15, 1899.

JOHN B. COTTON, Esq., *Washington, D. C.*

DEAR SIR: —I am directed by the Governor and Council to say that I am authorized to enter into a contract with you in behalf of the Commonwealth for the collection of claims for interest money paid by the Commonwealth for loans incurred to meet the expenses of raising troops for the war of the rebellion, for 10 per cent. of the amount collected; the same to be in full of all charges.

As I remember, the enclosed form of contract is sufficient in form. If you agree to the terms, and will insert the amount specified and execute it on your part, in duplicate, I will have similar execution made by the Governor in behalf of the Commonwealth.

Yours very truly,

(Signed) HOSEA M. KNOWLTON,
Attorney-General.

And the form of contract referred to in said letter as enclosed therewith being in all respects satisfactory to your complainant, it was executed in duplicate by him without change, alteration or addition other than to fill in with the date of execution and the amount of compensation, as specified in said resolution of the Council, the blanks left therein for such purpose, and immediately thereafter said duplicate copies of said proposed contract were returned by this complainant to said Attorney-General Knowlton for the further execution by Governor Wolcott on behalf of the Commonwealth.

6. Thereafter, said duplicate copies of said proposed contract so executed by your complainant having been received by said the Attorney-General of the Commonwealth he forwarded the same to Governor Wolcott with the following communication: —

JULY 19, 1899.

To His Excellency ROGER WOLCOTT, *Governor.*

DEAR SIR: — In obedience to the instructions of the Executive Council, embodied in the vote of that honorable body passed at a meeting held on July 12, I have prepared a form of contract in duplicate between the Commonwealth and John B. Cotton, authorizing him to prosecute the claim of the Commonwealth of Massachusetts for interest money paid by the Commonwealth for loans incurred to meet the expenses of raising troops for the war of the rebellion. The duplicates have been duly signed by Mr. Cotton and returned to me.

I have the honor to enclose them herewith for execution by Your Excellency in behalf of the Commonwealth. When so executed, and the seal of the Commonwealth affixed, one copy should be sent to Mr. Cotton and the other retained among the archives of the Commonwealth.

Yours very truly,

HOSEA M. KNOWLTON,
Attorney-General.

And the same having been duly executed by said Governor Wolcott, under his hand and the official seal of the Commonwealth, one copy thereof was placed in the archives of the Commonwealth, where it still remains, and the duplicate original thereof was delivered to your complainant and subsequently filed by him in the treasury of the United States as evidence of his right and authority to appear before that Department in the prosecution of said claim and to recover for and in behalf of the Commonwealth the amount found to be due to it on account thereof.

The said contract, which was also the power of attorney of your complainant, is still in full force and effect, never having been revoked or otherwise annulled, and is in the words and figures following, to wit: —

Memorandum of an agreement and appointment made this eighteenth day of July, A.D. 1899, by and between the Commonwealth of Massachusetts by Roger Wolcott, its Governor, on the one part, and John B. Cotton of Washington, District of Columbia, on the other part:

Witnesseth, *whereas*, said Commonwealth of Massachusetts has a claim against the United States for "costs, charges and expenses properly incurred by said State for enrolling, subsisting, clothing, supplying, arming, equipping, paying and transporting its troops engaged in aiding to suppress the insurrection against the United States" between the years 1861 and 1865, both inclusive, under and by virtue of an act entitled "An Act to indemnify the States for expenses incurred by them in defence of the United States," approved July 27, 1861, and the resolution approved March 8, 1862, declaratory of the intent and meaning of the act aforesaid; and

Whereas, said Commonwealth of Massachusetts is about to present to the Treasury Department of the United States its claim aforesaid:

Now, *therefore*, said Roger Wolcott, Governor of the Commonwealth of Massachusetts, for and in consideration that said John B. Cotton has agreed to present, prosecute and endeavor to recover before the Court of Claims, the Supreme Court of the United States, and the Treasury Department of the United States said claim of the Commonwealth of Massachusetts, has appointed and does hereby appoint said John B. Cotton its agent and attorney to present, prosecute and recover the claims as aforesaid on the terms and conditions hereinafter specified.

Said John B. Cotton agrees to prepare, present, prosecute and endeavor to recover before said Court of Claims, the Supreme Court of the United States, and the Treasury Department of the United States the claim aforesaid on behalf of said Commonwealth of Massachusetts at a compensation of 10 per centum of the entire sum collected, payable only out of any sums that may be collected hereunder, and without any liability on behalf of said Commonwealth of Massachusetts for expenses incurred by said Cotton in the prosecu-

tion of said claim in bringing of petitions, taking depositions, employing of expert accountants, printing of records and briefs, fees of commissioners, costs of court or of any other expense of any kind or nature whatsoever, excepting only the clerical assistance hereinafter specified, and said John B. Cotton does further agree to make and present to the Governor of the Commonwealth of Massachusetts or the Attorney-General or any other officer of said Commonwealth designated by the Governor, at the end of each six months, or oftener if thereto requested, a full report concerning the status and condition of said claim.

It is further understood and agreed that said John B. Cotton shall give prompt attention to the prosecution of said claim and that he shall be furnished by the proper department of the Commonwealth of Massachusetts facilities and clerical assistance of department clerks for the examination of the books and records of said Commonwealth in relation to said claim, necessary and proper for making up, presentation and prosecution thereof.

In witness whereof, said Roger Wolcott, Governor of said Commonwealth, and in behalf thereof, has hereunto set his hand, and caused the seal of said Commonwealth to be hereto affixed, and said John B. Cotton has hereunto set his hand and seal the day and year first above written.

Signed and sealed in duplicate in presence of

ROGER WOLCOTT,
Governor of the Commonwealth of Massachusetts
JOHN B. COTTON.

(Seal of the Commonwealth of Massachusetts.)

7. Thereafter, that is to say immediately upon receipt of said duplicate copy of said power of attorney and contract duly executed by the Commonwealth of Massachusetts and this complainant as aforesaid, your complainant entered upon the performance of his duties as attorney and agent thereunder, and did continuously and unremittingly thereafter render services in such connection, both before the Secretary of the Treasury, the Auditor and the Comptroller of the

Treasury and the United States Court of Claims, and elsewhere, and to such effect that on or about the second day of May, A.D. 1904, there was issued by the United States Treasury Department a warrant in favor of the Governor of the State of Massachusetts for the sum of $1,611,740.85, which said warrant, being in words and figures following: —

WAR SETTLEMENT WARRANT. No. 11343.

UNITED STATES TREASURY DEPARTMENT,
WASHINGTON, D. C., May 2, 1904.

To the Treasurer of the United States.

Pay to the Governor of the State of Massachusetts, or order, one million, six hundred eleven thousand, seven hundred forty 85/100 dollars ($1,611,740.85).

C. H. KEEP,
Assistant Secretary.
R. J. TRACEWELL,
Comptroller.
C. M. FOREE,
Chief Clerk.

The Assistant Treasurer, U. S., Boston, will pay this warrant.

J. F. MELINE,
Assistant Treasurer.

No. 25639.

P. O. Address, Ce JOHN B. COTTON, *Agent and Atty.*, Washington, D. C.

was, under the authority of his said power of attorney and contract, and in accordance with the long-established custom of the Treasury Department, delivered to your complainant as the duly recognized and acting attorney of said Commonwealth.

8. During the progress of the prosecution of said claim before said Court of Claims and the United States Treasury

Department and elsewhere, your complainant at all times kept the Attorney-General of the Commonwealth of Massachusetts and the Governor thereof fully informed as to his acts and doings thereabouts, and at no time was any dissatisfaction expressed by such officers with any of his said acts and doings, but on the contrary many words in commendation of his labors and the result being effected thereby were written and spoken to your orator not only by Governor Wolcott and Attorney-General Knowlton, by whom said contract and power of attorney was executed, but also by their successors in office, including the Hon. John L. Bates, the present Governor of the Commonwealth, and the Hon. Herbert Parker, the present Attorney-General thereof, and at no time by any of such officers was any dissatisfaction expressed with said contract or the labors of your complainant thereunder until subsequent to the making of the appropriation by the Congress in the above amount to satisfy this claim, and the warrant in question was about to be issued therefor, when the said Herbert Parker, Attorney-General as aforesaid, intimated to your complainant that in his view the compensation agreed to be paid under and by the contract aforesaid was much too large, and suggested that the matter of the amount to be paid to your complainant in the premises, notwithstanding the solemn compact of the State in the premises made before the services were rendered by this complainant, should be submitted to arbitrators for ascertainment and determination, which suggestion your complainant declined to consider or adopt.

9. Thereafter, on the fourth day of May, A.D. 1904, your complainant over his firm name and signature of "Cotton & White" notified the Hon. Herbert Parker, Attorney-General as aforesaid, by letter, that the warrant in question had been delivered to him by the Treasury Department "under the

authority of the contract between the Commonwealth of Massachusetts" and himself, and thereafter, on the sixth day of May, 1904, said Attorney-General, in writing, acknowledged the receipt of said notification and said: —

I have advised His Excellency the Governor of the receipt of your communication, and am requested by him to say to you that he awaits the immediate transmission of the warrant to him.

Thereafter, this complainant on the twelfth day of May, 1904, replied to said Attorney-General, by letter, saying therein among other things that —

The warrant in question was transmitted to me by the Department of the Treasury as the agent and attorney of the Commonwealth of Massachusetts. Such is the usual custom of the Department and has been so in respect to all the State cases. . . . Under the law I was [am] entitled to a lien upon the warrant for the amount of my fees, as by the contract, and to retain the warrant until such fees are paid me, which [act] I had a right to assume would be simultaneous with the delivery of the warrant to the Governor. As I have received intimations that you do not consider me entitled to receive my pay in full, under my contract, and as I entertain no doubt as to my rights under the same, I feel amply justified in asserting my lien. For these reasons I must respectfully decline to deliver the warrant until the fees are paid. —

and on the same day forwarded by mail a copy of said letter direct to the Hon. John L. Bates, Governor of said Commonwealth.

On the fourteenth day of May, A.D. 1904, your complainant, in writing, notified the Hon. Leslie M. Shaw, Secretary of the Treasury, that he claimed

a lien for compensation upon the sum mentioned in said warrant, and also upon the warrant itself, in accordance with my [his] contract and the law in relation thereto.

On the sixteenth day of May, A.D. 1904, said Attorney-General Parker, acknowledging receipt of your complainant's said letter of May 12, said among other things: —

As you know, the question as to the authority of the contract under which you have acted in the prosecution of the Commonwealth's claim has caused me much anxiety, and upon which issue I have entertained grave doubts. I had hoped that I should have reached a conclusion that would have dissipated all doubts and have enabled me to advise in favor of the validity of the agreement. A study of the question, however, has not yet brought me to that conclusion, though my investigation is not fully complete.

I do not venture at this moment to express any opinion as to your lien upon the warrant payable to the Governor of this Commonwealth. Whether you have such right or not, I much regret you have felt that the protection of your rights required its assertion.

On the twenty-eighth day of May, A.D. 1904, your complainant addressed and mailed a further communication to said Governor Bates, wherein, after reviewing the correspondence hereinbefore referred to, the following language appears: —

That there may be no possible misunderstanding of my position in this matter, I desire to say, what I think I have already said in substance, that I am now and always have been ready to deliver to Your Excellency the warrant now in my possession at any time when the Commonwealth is ready to pay me the fees to which justly and legally I believe I am entitled. And I desire further to say that if Your Excellency will appoint any reasonable time at which I may both deliver the warrant to you and receive my compensation of 10 per cent. thereof, I shall be glad to do so.

The letter of May 16 from the Attorney-General led me to expect, and I think with good reason, that I would be notified at a reasonably early date as to the conclusion to which Your Excellency and he had come in regard to the validity of my agreement with the

Commonwealth. I have waited patiently for this decision, but as yet have not received it.

Apart from all considerations as to my legal right to have you say whether the Commonwealth does or does not regard my agreement as a valid one (and I think I have a legal right to know whether you recognize it or not), it seems to me clear that, in view of my long and arduous service in behalf of the Commonwealth in the matter, the pleasant relations which have always existed between us, and the frequent and very gratifying commendations of my work which I have received both from the executive and the legal departments of the Commonwealth, I am entitled to this much of consideration on your part as an act of simple justice.

A determination of this main question on your part would also, even if adverse to me, relieve the situation of many of its present unpleasant features, and leave both parties to take such legal action as they may be advised.

I respectfully ask Your Excellency, therefore, to inform me at your early convenience whether the validity of my claim to compensation at the rate of 10 per cent. is acknowledged or denied by the Commonwealth.

And also on the same date mailed a copy of said communication to the Hon. Attorney-General Parker for his information, the receipt of said copy being acknowledged by said Attorney-General under date of May 31, 1904, all of which, together with the reply of your complainant to said last-mentioned letter, will fully and at large appear upon inspection of the true copies of all of said letters hereto attached marked Exhibits A, 1 to 10 inclusive, all of which are hereby made part and parcel of this bill of complaint and prayed to be read therewith as though they had been set forth fully and at large herein.

10. Since the date of said last-mentioned letter marked Exhibit A–10, as aforesaid, same being dated June 6, 1904, neither said Governor Bates nor said Attorney-General

Parker have communicated further with your complainant on the said subject, but your complainant has been informed by the defendant, Leslie M. Shaw, Secretary of the Treasury, as aforesaid, that since said date, to wit, on the day of July, A.D. 1904, said Governor Bates had requested him to cancel the warrant heretofore issued in favor of the said Governor of the State of Massachusetts and delivered to your complainant as aforesaid, and to have prepared and issued direct to said Governor a second warrant for the total amount of the $1,611,740.85; and notwithstanding your complainant's objections in the premises and his rights as attorney to be protected to the extent of the amount of fees solemnly and distinctly contracted to be paid to him, said defendant, Leslie M. Shaw, in his official capacity of Secretary of the Treasury, without any warrant or authority in law for so doing, threatens to cancel on the books of the Treasury Department the warrant hereinbefore particularly set forth and described, being War Settlement Warrant No. 11343, dated May 2, 1904, and also to cancel all entries and notations concerning the signing and issuance thereof; and further threatens to have prepared, signed and issued a duplicate or second warrant of like tenor and effect, and to issue and deliver the same direct to the said defendant John L. Bates, Governor as aforesaid, the sole object and purpose of so doing being to defeat this complainant's right of lien and to delay and possibly defeat entirely the payment to him of the compensation by the contract hereinbefore set forth agreed to be paid to him, said contract having been fully executed and performed upon your complainant's part.

Wherefore, inasmuch as complainant is entitled in law to his attorney's lien upon the papers of his client now in his possession, including among such papers the warrant in question, and is also entitled by the same law to have said

lien and the results which would naturally and usually flow from the possession and assertion thereof duly protected, and as in such regard he is otherwise remediless and without redress, inasmuch as neither of said defendants nor both together, so far as complainant is advised or believes, are or would be personally able to respond in damages in any amount at all approximating the amount of the fees agreed to be paid to him under his said contract and for the payment of which he is lawfully entitled to assert and maintain his attorney's lien upon the warrant aforesaid, complainant prays: —

(1.) That writs of subpœna may be issued and served upon the defendants who are, 1, Leslie M. Shaw, Secretary of the Treasury, 2, John L. Bates, Governor of the Commonwealth of Massachusetts.

(2.) That said defendant, Leslie M. Shaw, and his assistants, subordinates and clerks, may be restrained and enjoined *pendente lite*, and after hearing, permanently, from cancelling or attempting to cancel upon the books of the Treasury Department or otherwise the Treasury Warrant heretofore issued in favor of the Governor of the State of Massachusetts and now in the possession of complainant, the same being War Settlement Warrant No. 11343, dated May 2, 1904, and drawn on the Treasurer of the United States in favor of the Governor of the State of Massachusetts, for the sum of $1,611,740.85; and that said defendant, Leslie M. Shaw, his assistants, subordinates and clerks, may also be restrained and enjoined *pendente lite* and after hearing, permanently, from drawing, making, signing or issuing to said defendant, John L. Bates, or any other person, a second or duplicate warrant in settlement or satisfaction of the claim of the State of Massachusetts, in this bill of complaint set forth, or in lieu or place of the said described warrant now outstanding and in possession of complainant as aforesaid.

(3.) That the defendant, John L. Bates, may be restrained and enjoined from asking, demanding or receiving from the defendant, Leslie M. Shaw, or any of his assistants, subordinates or clerks, a second or duplicate warrant as aforesaid.

(4.) And for such other and further relief as to, the premises considered, this honorable court may seem to be right and proper in the premises.

And complainant will ever pray, etc.

JOHN B. COTTON.

FREDERICK D. MCKENNEY,
Solicitor for Complainant.

WM. FRYE WHITE,
Solicitor for Complainant.

DISTRICT OF COLUMBIA, ss.

I, John B. Cotton, being first duly sworn, do solemnly swear that I have read the bill of complaint by me subscribed, and know the contents thereof, and the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

JOHN B. COTTON.

Subscribed and sworn to before me this ninth day of August, A.D. 1904.

(Notarial Seal.)

JAMES MALCOLM HENRY,
Notary Public, D. C.

[Filed Nov. 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–1.

MAY 4, 1904.

Hon. HERBERT PARKER, *Attorney-General, Boston, Mass.*

SIR: — We have the honor to advise you that under the authority of the contract between the Commonwealth of Massachusetts and our Mr. Cotton, and following the custom of the Treasury Department, that Department has delivered to our Mr. Cotton treasury warrant

payable to the Governor of the Commonwealth of Massachusetts for $1,611,740.85, which is the amount appropriated by Congress to reimburse the Commonwealth for expenditures, etc., under the act of Congress of July 27, 1861.

We are yours very respectfully,

COTTON & WHITE.

[Filed Nov. 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–2.

COMMONWEALTH OF MASSACHUSETTS,
OFFICE OF THE ATTORNEY-GENERAL, BOSTON, May 6, 1904.

Messrs. COTTON & WHITE, *Sun Building, Washington, D. C.*

GENTLEMEN: — I have received your communication of May 4, 1904, in which you state that under the authority of the contract between the Commonwealth of Massachusetts and your Mr. Cotton, and following the custom of the Treasury Department, that Department has delivered to your Mr. Cotton treasury warrant, payable to the Governor of the Commonwealth of Massachusetts, for $1,611,740.85. I have advised His Excellency the Governor of the receipt of your communication, and am requested by him to say to you that he awaits the immediate transmission of the warrant to him.

Respectfully yours,

HERBERT PARKER,
Attorney-General

[Filed Nov. 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–3.

MAY 12, 1904.

Hon. HERBERT PARKER, ATTORNEY-GENERAL, *Boston, Mass.*

DEAR SIR: — I take my very first opportunity, on my arrival home, to answer your letter of May 8, 1904, replying to that of Cotton & White of May 4, 1904. You say: "I have advised His Excellency the Governor of the receipt of your communication and I am requested by him to say to you that he awaits the immediate transmission of the warrant to him."

The warrant in question was transmitted to me by the Department of the Treasury as the agent and attorney of the Commonwealth of

Massachusetts. Such is the usual custom of the Department and has been so in respect to all the State cases. According to the rules of the Department I filed with it my duplicate original of the contract entered into between the Commonwealth and myself, appointing me its agent and attorney to prosecute the claim of the Commonwealth against the United States. Under the law I was entitled to a lien upon the warrant for the amount of my fees, as by the contract, and to retain the warrant until such fees are paid me, which act I had a right to assume would be simultaneous with the delivery of the warrant to the Governor. As I have received intimations that you do not consider me entitled to receive my pay in full, under my contract, and as I entertain no doubt as to my rights under the same, I feel amply justified in asserting my lien.

For these reasons I must respectfully decline to deliver the warrant until the fees are paid.

I desire to assure you, both personally and in your capacity of Attorney-General, that I much regret the condition which, without fault on my part, has obliged me to come to the above conclusion.

For nearly five years I have diligently and faithfully striven to advance the interests of the Commonwealth in the collection of this claim. My work was done under a contract with the Commonwealth which at the time of its making, as well as now, I have every reason to believe was lawful. The contract was made under the supervision of a learned lawyer, Mr. Attorney-General Knowlton, after a careful consideration of the whole subject-matter, and on official advice by him to Governor Wolcott.

This is not the occasion to enter into a discussion of the circumstances attending the inception and making of the contract, or of my labors under it. If you have ever entertained any doubts respecting the technicalities involved in the making of the contract, I trust that your further examinations have solved them in favor of its legality and the justice of the payment to me of my fees. The records of your Department during the incumbency of Mr. Attorney-General Knowlton, and since your accession to the office, show the faithfulness with which I have performed the duties under my contract, and I have received from time to time your own personal testimonials as to the value of my work.

Referring to the equities of the contract, I think you will not disagree with me as to the fairness of the per cent. to which I am entitled. Whilst it is true that the case demanded a large amount of clerical work, the legal questions involved, being without precedent, and ranging through constitutional law and other topics, have been arduous, and required the greatest care.

I therefore beg leave to suggest what other States have done in respect to fees in like cases which seems to me to be strongly persuasive. The State of Maine contracted to pay, and did pay, 20 per centum of the amount recovered; New Hampshire paid 15 per centum; Vermont contracted to pay 25 per centum, not exceeding $40,000, and the amount recovered was, in round numbers, $280,000. The State of Kentucky paid 10 per centum on $900,000, and Pennsylvania paid 10 per centum on $1,500,000, in round numbers.

I know that it is your wish to do what is right about the matter, and that you will accord to me the same consideration. I want the Commonwealth as speedily as possible to have the benefit of this money.

I know that by not making this claim as early as 1878, when the last of the Commonwealth's bonds were paid, reckoning at 6 per cent. on the amount of the appropriation, your State has lost nearly two million of dollars. I feel that I have a right to claim some credit upon the finding of a way to legally obtain a determination of the Commonwealth's right, which had slumbered all this time, and was barred by the statute of limitations in the only court which could give judgment in its favor. I fully believe your State is entitled to a very much larger sum than she gets, and that the award should have been, under the claim filed by me, nearly a million and a half dollars greater than she will receive.

I sincerely trust that His Excellency the Governor will find it compatible, both with law and justice, to pay my fees upon the basis of the contract, and release to the State the money which she long since ought to have received.

I have the honor to be,

Yours very respectfully,

JOHN B. COTTON.

[Filed Nov. 18, 1904. J. R. Young, *Clerk.*]

Exhibit A–4.

May 12, 1904.

To His Excellency the Governor.

My Dear Sir: — I enclose herewith a statement of my reasons for declining to forward to you the warrant for the late appropriation to the Commonwealth of Massachusetts from the United States, made as the result of my contract of July, 1899. I have communicated the original to Hon. Herbert Parker, Attorney-General of the Commonwealth, for the reason that the request for the transmission of the warrant was made by you through him.

I could not do justice to myself, however, without addressing a brief statement personally to you. In so doing I refer to the enclosed, not as an exhaustive statement of the history of the matter and of my views in relation to the same, but as giving you a general outline of such views. As the Chief Executive of the Commonwealth you are entitled to them, and I give them also because of the pleasant relations which have existed between yourself and myself and my friends in relation to this case.

I have practised law between thirty-eight and forty years, both in federal and State courts, and in an honored position in the office of the Attorney-General of the United States, and I have never had occasion to seriously disagree with those for whom I have acted, and I know you will believe me when I say that the present condition is one exceedingly unpleasant to me.

I can assure you that during the long time I have been acting for the Commonwealth I have endeavored to faithfully perform my duties for her best interests. I have given the matters involved the closest attention possible. I have spared neither time nor legitimate expense.

I am not satisfied with the result of the audit of your claim. I honestly believe it to be less by a million and a half of dollars than it should be. The result, however, is a common one in the prosecution of claims against the United States, in which many honest creditors have been denied their just dues.

It will be gratifying to me when your State shall obtain the sum allowed, for such uses as your Legislature in its wisdom shall desire to vote to it.

I have the honor to be,

Yours respectfully,

JOHN B. COTTON.

Hon. JOHN L BATES, Boston, Mass.

[Filed Nov. 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–5.

MAY 14, 1904.

To the Secretary of the Treasury.

SIR: — Referring to the appropriation by Congress of the sum of $1,611,740.85, in behalf of the Commonwealth of Massachusetts for reimbursement under the act of July 27, 1861, and for which said amount you have issued a warrant of the Department of the Treasury, directing the same to the Governor of the Commonwealth of Massachusetts, in my care as agent and attorney of said Commonwealth, and which is now in my possession, in accordance with the contract between the Commonwealth and myself a duplicate original of which is filed in your Department, I beg leave to say that whilst I trust there is no necessity for this notification, yet, out of abundant caution, I desire to notify you that I claim a lien for compensation upon the sum mentioned in said warrant, and also upon the warrant itself, in accordance with my contract and the law in relation thereto.

I am yours very respectfully,

JOHN B. COTTON.

Hon LESLIE M. SHAW, Washington, D. C.

[Filed Nov. 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–6.

COMMONWEALTH OF MASSACHUSETTS,
OFFICE OF THE ATTORNEY-GENERAL, BOSTON, May 16, 1904.

JOHN B. COTTON, Esq, *Sun Building, Washington, D. C.*

DEAR SIR: — I beg to acknowledge yours of May 12. As you know, the question as to the authority of the contract under which you have acted in the prosecution of the Commonwealth's claim has

caused me much anxiety, and upon which issue I have entertained grave doubts. I had hoped that I should have reached a conclusion that would have dissipated all doubts and have enabled me to advise in favor of the validity of the agreement. A study of the question, however, has not yet brought me to that conclusion, though my investigation is not fully complete.

I do not venture at this moment to express any opinion as to your lien upon the warrant payable to the Governor of this Commonwealth. Whether you have such right or not, I much regret that you have felt that the protection of your rights required its assertion. Your frank statement of your claim complicates the situation for the moment, and may add still further complications, but of course you anticipated such results and have prepared yourself for them. I assume that the Governor and Council will immediately determine upon such course of action as may be concluded to be required and justified, and you will be seasonably advised of their decision.

I should be glad of an opportunity to confer again either with you or with your counsel, if you have such, for, as I have stated to you, I have no wish to raise any issue except such as seems to be imperatively demanded by official duty.

I am yours very truly,

(Signed) HERBERT PARKER,
Attorney-General.

[Filed November 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–7.

WASHINGTON, D. C., May 28, 1904.

To His Excellency JOHN L. BATES, *Governor.*

DEAR SIR: — On May 4 I notified Attorney-General Parker that I had received the warrant to the Commonwealth of Massachusetts from the United States, for the appropriation made as the result of my service in behalf of the Commonwealth as its agent and attorney in the prosecution of war claims pursuant to my contract of July, 1899.

On May 6 the Attorney-General replied to me, saying in substance that he had advised Your Excellency of the receipt of my

communication, and had been requested by you to say in reply that you awaited "the immediate transmission" of the warrant to you.

Under date of May 12 I wrote both to Your Excellency and to the Attorney-General at some length, saying, in substance, that under my contract with the Commonwealth, as well as by the general provisions of the law applicable to such matters, I am entitled to a lien upon the warrant for the amount of my fees, and that, in view of the apparent unwillingness of the Commonwealth, as represented by Your Excellency and by the Attorney-General, to recognize the validity of my claim to ten per cent. of the amount collected, as agreed upon, I felt bound, in justice to myself, to assert this lien. At the same time I expressed my entire willingness, and indeed my earnest desire, to turn over the warrant to you simultaneously with the payment of my fees.

In his reply under date of May 16 the Attorney-General said: "As you know, the question as to the authority of the contract under which you have acted in the prosecution of the Commonwealth's claim has caused me much anxiety, and upon which issue I have entertained grave doubt. I had hoped that I should have reached a conclusion that would have dissipated all doubts and have enabled me to advise in favor of the validity of the agreement. A study of the question, however, has not brought me to that conclusion, though my investigation is not fully complete. . . . I assume that the Governor and Council will immediately determine upon such course of action as may be concluded to be required and justified, and you will be seasonably advised of their decision."

Since that time I have been informed by friends of mine who had an interview with the Attorney-General about the matter that he was inclined to question my right to a lien upon the warrant, and to think that I was bound to deliver the warrant to you, irrespective of my right to my fees and while you still refuse to recognize such right. But I have received no intimation whatever as to whether the Attorney-General has completed his investigation, or as to the conclusion to which he may have come upon the main and I hope the only real issue between us.

I cannot assent to the proposition that I have no lien upon the

sum collected. It is true that by the terms of the written contract of July, 1899, my compensation is payable out of the sum collected for the Commonwealth, but, as I understand the law, the effect of a provision of this kind is to give a lien and not to destroy it.

Assuming that a lien exists in cases where compensation is payable out of the sum collected, it is, of course, apparent that where both parties elect to stand upon their strict legal rights, their several interests are fully protected only by simultaneous action, the payment of fees being contemporaneous with the delivery of the amount collected.

That there may be no possible misunderstanding of my position in this matter, I desire to say, what I think I have already said in substance, that I am now and always have been ready to deliver to Your Excellency the warrant now in my possession at any time when the Commonwealth is ready to pay me the fees to which justly and legally I believe I am entitled. And I desire further to say that if Your Excellency will appoint any reasonable time at which I may both deliver the warrant to you and receive my compensation of 10 per cent. thereof, I shall be glad to do so.

The letter of May 16 from the Attorney-General led me to expect, and I think with good reason, that I would be notified at a reasonably early date as to the conclusion to which Your Excellency and he had come in regard to the validity of my agreement with the Commonwealth. I have waited patiently for this decision, but as yet have not received it.

Apart from all considerations as to my legal right to have you say whether the Commonwealth does or does not regard my agreement as a valid one (and I think I have a legal right to know whether you recognize it or not), it seems clear to me that, in view of my long and arduous service in behalf of the Commonwealth in the matter, the pleasant relations which have always existed between us, and the frequent and very gratifying commendations of my work which I have received both from the executive and the legal departments of the Commonwealth, I am entitled to this much of consideration on your part as an act of simple justice.

A determination of this main question on your part would also,

even if adverse to me, relieve the situation of many of its present unpleasant features, and leave both parties to take such legal action as they may be advised.

I respectfully ask Your Excellency, therefore, to inform me at your early convenience whether the validity of my claim to compensation at the rate of 10 per cent. is acknowledged or denied by the Commonwealth.

Yours very respectfully,
(Signed) JOHN B. COTTON.

[Filed Nov. 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–8.

MAY 28, 1904.

Hon. HERBERT PARKER, *Attorney-General, Boston, Mass.*

MY DEAR MR. PARKER: — Enclosed you will find copy of a communication under this date to His Excellency John L. Bates, in relation to the matter of my compensation from the Commonwealth, for services in the matter of the collection from the United States for the interest on the war loan. I trust the communication will clearly inform you of my view of the present status of the matter. I further hope that you have been able by this time to come to a decision upon the matters of which you have stated to me you had doubts. I desire to say to you in addition that I am very anxious that this whole matter, the present condition of which I deplore, will soon be satisfactorily settled.

I am very truly yours,
JOHN B. COTTON.

[Filed Nov. 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–9.

COMMONWEALTH OF MASSACHUSETTS,
OFFICE OF THE ATTORNEY GENERAL, BOSTON, May 31, 1904.

JOHN. B. COTTON, Esq., *Washington, D. C.*

MY DEAR MR. COTTON: — I have yours of May 28 enclosing copy of a communication to His Excellency the Governor, in the matter of your claim for compensation upon the prosecution of the

demand against the federal government. I have already, both by letter and in conversation, stated to you my view of the status of your claim and of the grave doubt I have as to the validity of the contract. I hoped that the presentation of your views as to the law, and those urged upon me by gentlemen representing you, would relieve me of the serious doubt which still impresses me.

No refusal on the part of the Commonwealth to pay your claim has ever been made, nor had you ever set forth the details of your claim in any demand. I wrote you that I much regretted your refusal to respond to the executive demand to deliver the warrant to the Governor, whose property it is, as representing the Commonwealth: and until it shall have been received by him, can neither be made available to the Treasurer of the Commonwealth nor applicable, in such part as may be so, to satisfy any claim that you have, upon the assumption of the validity of your contract.

I wrote you, in view of this unfortunate, and, I confess, unexpected attitude of yours, that if you adhered to it the Governor and Council would doubtless take such action in the premises as should be deemed necessary to protect the interests of the State, of which you would be advised. This action was not to be a determination on the validity of your contract, but such as is made necessary by what I consider to be a breach of its vital provisions, if it be a valid agreement. I have already said in the plainest terms to the gentlemen representing you that while you adhere to a position which, plainly upon its face, to my mind shows a non-performance of your assumed contract, there can be, so far as I am concerned, no communication touching the validity of the contract itself; nor should I deem it consistent with the position that I must maintain to discuss with you or to make intimation to you what view I hold as to the validity of the contract itself. Presupposing its validity, and in order to enable you to have any rights or to take any benefit under it, I need hardly say to a lawyer that a contract must first be performed in its every detail. I repeat that the action to which I referred in my letter to you to be taken by the Governor and Council has no relation to any declaration as to my own view of your rights under the alleged contract, but only to such action as might

become necessary through your own refusal to perform a contract upon which you assert your rights depend.

I am very respectfully yours,

(Signed) HERBERT PARKER,
Attorney-General.

[Filed Nov. 18, 1904. J. R. YOUNG, *Clerk.*]

Exhibit A–10.

JUNE 6, 1904.

Hon. HERBERT PARKER, *Attorney-General, Boston, Mass.*

MY DEAR MR. ATTORNEY-GENERAL: — I have the honor to acknowledge the receipt of your kind letter bearing date May 31, but received by me on the 3d instant.

I note that you do not say that your letter is written by request of the Governor in response to my letter to him of May 28, a copy of which, out of deference to you, I enclosed you. I assume, therefore, that you mean me to take this merely as an expression of your personal views, and not as the answer of the Governor. Of course I do not say to you that mine of the 28th was addressed directly to the Governor, not through any want of respect to you, but because legal formalities sometimes require communications should be directed to the client rather than through the attorney. I am awaiting His Excellency's reply to my letter, and will defer further answer to yours until I have received the same.

In saying this, I want emphatically to disclaim any discourtesy, intentional or otherwise, to you, and I trust you will so receive it.

With personal regards,

I am yours very respectfully,

JOHN B. COTTON.

OFFICE OF THE CL
RECEIVED
DEC 29 1904
SUPREME COURT

FILE COPY.

Supreme Court of the United States.

ORIGINAL. OCTOBER TERM, 1904. No. 15.

In Re COMMONWEALTH OF MASSACHUSETTS,
PETITIONER.

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION.

HERBERT PARKER,
Attorney-General of Massachusetts.

FREDERICK H. NASH,
Assistant Attorney-General of Massachusetts.

Office Supreme Court U. S.
FILED
JAN 3 1905
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

ORIGINAL. OCTOBER TERM, 1904. No.

In Re COMMONWEALTH OF MASSACHUSETTS, PETITIONER.

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION.

STATEMENT OF THE CASE.

Congress, on the twenty-seventh day of April, 1904, appropriated $1,611,740.85 to the Commonwealth of Massachusetts on account of the Commonwealth's expenses in defence of the Union. The Secretary of the Treasury, Leslie M. Shaw, drew a warrant for that sum, payable to the Governor of Massachusetts or order, and delivered it to John B. Cotton of Washington, D. C., who claimed to be entitled to receive from the Commonwealth of Massachusetts 10 per cent. of that amount, under a contract with Massachusetts whereby he was made its agent and attorney to present, prosecute and endeavor to recover before the Court of Claims, the Supreme Court of the United States and the Treasury Department of the United States, the claim of Massachusetts upon which that appropriation was based. This delivery was without notice to

any one else representing Massachusetts, although only the Governor was authorized to receive payment of the warrant. John B. Cotton, claiming a lien on the fund appropriated and on the warrant, for 10 per cent. of that amount, refused to turn over the warrant to the Governor until his claim should first be satisfied. The Governor demanded a duplicate warrant, but the Secretary of the Treasury refused to issue one, taking the position that his duty permitted him to assist a claim agent to coerce his client into settling all questions that might arise between them, at the agent's own terms. Upon the Governor's request, however, he took the opinion of the Attorney-General of the United States in the matter, and was advised that he should issue a duplicate warrant and deliver it to the Governor.

The same day of the Attorney-General's opinion, and before the Governor of Massachusetts was advised of it, and before the Secretary of the Treasury could issue a new warrant, John B. Cotton filed in the Supreme Court of the District of Columbia a bill in equity in which the Secretary of the Treasury and the Governor of Massachusetts were named as defendants, setting forth his contract with the Commonwealth of Massachusetts and asserting that he was entitled to enforce a lien upon the original warrant in his possession by perpetually restraining the Secretary of the Treasury from issuing a second warrant, and restraining the Governor of Massachusetts, or any one else in behalf of Massachusetts, from asking or receiving one. At once the Supreme Court of the District of Columbia issued a rule commanding the parties named as defendants to show cause why they should not be thus enjoined. No service upon the Governor of Massachusetts was made or attempted. Neither he nor the Commonwealth of Massachusetts has appeared in the suit. Upon the return day of the rule, Nov. 22, 1904,

the hearing thereon was indefinitely postponed. This equity suit is still pending.

To remove the unlawful restraint upon the Secretary's conduct, effected by the action of the Supreme Court of the District of Columbia in taking jurisdiction of the equity suit, this petition is brought.

I.

The Supreme Court of the District of Columbia has no Jurisdiction of John B. Cotton's Bill in Equity.

This appears upon the face of the bill. The only standing which the plaintiff asserts therein is his right under his contract with the Commonwealth of Massachusetts. Whether that contract gave him any right is a question which can be determined only in the courts of Massachusetts, where alone the Commonwealth of Massachusetts has consented to be impleaded.

Eleventh Amendment to the United States Constitution.
Revised Laws of Massachusetts, c. 201.
Hans *v.* Louisiana, 134 U. S. 1.
Smith *v.* Reeves, 178 U. S. 436.

It is obvious that the Commonwealth of Massachusetts has such an interest in the question whether John B. Cotton may have the Secretary of the Treasury enjoined from issuing the warrant to it in payment of the appropriation by Congress that it is an indispensable party to the suit; yet neither it nor the Governor representing it can be made a party, nor can any officer representing it consent to jurisdiction over it by the Supreme Court of the District of Columbia at the suit of John B. Cotton. Therefore, the Supreme

Court of the District of Columbia can make no decree between John B. Cotton and the Secretary of the Treasury.

In *Ribon* v. *Railroad Cos.*, 16 Wall. 446, it is said: —

The rule in equity as to parties defendant is that all whose interests will be affected by the decree sought to be obtained must be before the court; and, if any such persons cannot be reached by process — do not voluntarily appear, or, from a jurisdictional objection going to the person in the courts of the United States, cannot be made parties — the bill must be dismissed. Where a decree can be made as to those present, without affecting the rights of those who are absent, the court will proceed. But if the interests of those present and of those absent are inseparable, the obstacle is insuperable.

The provisions of the Revised Statutes of the United States, section 738, do not displace the above fundamental principle of jurisprudence.

Gregory *v.* Stetson, 133 U. S. 579, 586.

In this case Mr. Justice Lamar said : —

In the case before us we are unable to see how any final decree could be rendered affecting the parties to the contract sued on without making them all parties to the suit. It is an elementary principle that the court cannot adjudicate directly upon a person's right without having him either actually or constructively before it. This principle is fundamental. . . . The point was made . . . that Mrs. Pike being a non-resident and beyond the jurisdiction of the court, it was impossible to join her as a party defendant to this suit, and that it was, therefore, unnecessary to attempt to do so. The court below ruled against the complainant on this point, and we see no error in that ruling. The general question involved therein has been before this court a number of times, and it is now well settled that notwithstanding the statute referred to (Rev. Sts., §738), and the forty-seventh equity rule, a Circuit Court can make no decree in

a suit in the absence of a party whose rights must necessarily be affected thereby. *Shields* v. *Barrow*, 17 How. 130, 141, 142; *Coiron* v. *Millaudon*, 19 How. 113, 115, and cases there cited.

In *California* v. *Southern Pacific Railroad Co.*, 157 U. S. 229, 249, *et seq.* the Chief Justice, dismissing an original bill for want of parties who ought to be joined but could not be joined without ousting the jurisdiction of the court, said: —

It was held, *Mallow* v. *Hinde*, 12 Wheaton, 193, 198, that where an equity cause may be finally decided between the parties litigant without bringing others before the court who would, generally speaking, be necessary parties, such parties may be dispensed with in the Circuit Court if its process cannot reach them or if they are citizens of another State; but if the rights of those not before the court are inseparably connected with the claim of the parties litigant so that a final decision cannot be made between them without affecting the rights of the absent parties, the peculiar constitution of the Circuit Court forms no ground for dispensing with such parties. And the court remarked: "We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must apply equally to all courts of equity, whatever may be their structure as to jurisdiction. We put it upon the ground that no court can adjudicate directly upon a person's right without the party being actually or constructively before the court."

See also Minnesota *v.* Northern Securities Co., 184 U. S. 199.
Daniell's Chancery Practice (3d Am. Ed.), pp. 285, 286.

The difficulty goes to the jurisdiction of the court, and when it appears on the face of the bill it is not a mere matter of defence, but requires the court to refuse to entertain the bill.

In *California* v. *Southern Pacific Railroad Co.*, *supra*, Mr. Justice Harlan, dissenting, in stating the effect of the court's decision, said: —

> Upon that ground alone it is held that we are without jurisdiction to pass a final decree as between the State and the defendant corporation.

The necessity, in a bill of this nature, of having both parties to the contract before the court and subject to its jurisdiction is pointed out in *Price* v. *Forrest*, 173 U. S. 410, and in *Sanborn* v. *Maxwell*, 18 App. D. C. 245, 253.

[*Note.*— The case of *McKee* v. *Lamon*, 159 U. S. 317, is not in point, because there it appeared that the Choctaw nation had, by resolve of its council, recognized the contract with its agent as valid and had appropriated the amount of its agent's percentage fee thereunder, to the satisfaction of the contract obligation, and the whole percentage fee had been paid to one agent although another was entitled to share in it. The controversy was solely between the two agents, and, as the court pointed out (page 322), the Choctaw nation had no longer any interest in the percentage fee.]

The application to our case of the principle illustrated by the above cases, that a court of equity has no jurisdiction in a suit by A against X to pass upon A's rights under his contract with B, unless B also is a party to the suit, is not in the least affected by the familiar line of cases, beginning with *Osborn* v. *Bank of United States*, 9 Wheat. 738, containing dicta that although a State may have an interest in a suit, a federal court whose judicial power does not extend to suits against a State may take jurisdiction in the State's absence from the record.

At the present stage of this case it is enough to say that a State is not an indispensable party or even a proper party

to an action *at law* in which its agent is sued on account of some act which he personally was charged with doing, or to a bill in equity to restrain its agent from enforcing an unconstitutional statute. The agent may not excuse himself for what he has done to the plaintiff's injury, or for refusing to do his duty toward the plaintiff by suggesting that the State is really the party interested, or by pleading a void State statute.

Osborn *v.* Bank of United States, 9 Wheat. 738.
United States *v.* Lee, 106 U. S. 196.
Pennoyer *v.* McConnaughy, 140 U. S. 1.
Reagan *v.* Farmers' Loan & Trust, 154 U. S. 389.
Scott *v.* Donald, 165 U. S. 108.
Tindal *v.* Wesley, 167 U. S. 204.
Smyth *v.* Ames, 169 U. S. 517.
Illinois Central R.R. *v.* Adams, 180 U. S. 28.
Missouri R.R. Co. *v.* Missouri Railroad Commissioners, 183 U. S. 53.

But when a State is so connected with a controversy in equity that, were it subject to the jurisdiction of the court, its joinder would be indispensable, the suit may not be entertained at all. The court is without jurisdiction.

Cunningham *v.* Macon & Brunswick R.R. Co., 109 U. S. 446.
Hagood *v.* Sothern, 117 U. S. 52.
See *In re* Ayers, 123 U. S. 443.
Louisiana *v.* Jumel, 107 U. S. 711.
Belknap *v.* Schild, 161 U. S. 10.
Fitz *v.* McGhee, 172 U. S. 516.

Illinois Central R.R. Co. v. *Adams*, 180 U. S. 28, in which Mr. Justice Brown discussed whether the objection that the action could not be prosecuted on account of the Eleventh

Amendment ought to be raised by motion to dismiss or by plea, was of the former class. From the bill on its face it did not appear that the State was an indispensable or even a proper party. It was a bill in equity against a State railroad commission to restrain it from approving and certifying an assessment for taxes, and against a revenue agent to restrain him from bringing any suit for the recovery of such taxes. Upon the face of the bill the Circuit Court had jurisdiction, it being a suit against the particular State officers who were charged with the enforcement of a State statute alleged to be in violation of the United States Constitution. (See *Smyth* v. *Ames*, 169 U. S. 517. Compare *Fitz* v. *McGhee*, 172 U. S. 516.) The present case is so palpably an attempt to adjudicate in an equity suit the validity and effect of a contract without bringing the other party to the contract before the court that the point which we raise belongs to the jurisdiction and not to the merits. The Supreme Court of the District of Columbia would have no jurisdiction of the bill were the other party to the contract an individual not actually or constructively before the court. It certainly gains no jurisdiction from the fact that the Commonwealth of Massachusetts, instead of such individual, is the other party to the contract.

When, therefore, John B. Cotton's bill was filed and a rule asked for, the court had no power to do anything except to dismiss the bill or order it stricken from the files. In courts of equity the power has always existed to refuse to entertain frivolous and vexatious bills, leaving to the complainant his remedy by mandamus to compel the court to take jurisdiction if the court was mistaken.

1 Daniell's Chancery Practice, 1st Ed., 402, 409, 461.

Brinkley v. Louisville & Nashville R. R. Co., 95 Fed. 345.

That power ought to have been exercised in the present case, where to entertain the bill was an unconstitutional affront to a sovereign State.

II.

The Remedy of the Commonwealth of Massachusetts for the Usurpation of Jurisdiction by the Supreme Court of the District of Columbia is by Writ of Prohibition to the Judges of that Court, restraining them from holding the Cause further before them, or by Writ of Mandamus to compel them to dismiss the Bill.

It is true the Commonwealth of Massachusetts might disregard any orders of the Supreme Court of the District of Columbia and apply to this court, under its original jurisdiction of suits by a State against citizens of another State, for a writ of mandamus to the Secretary of the Treasury to compel him to pay the appropriation of Congress.

See United States *ex rel.* Miller *v.* Black, 128 U. S. 40.

United States *ex rel.* Redfield *v.* Windham, 137 U. S. 636.

United States *ex rel.* Boynton *v.* Blaine, 139 U. S. 306.

Roberts *v.* United States, 176 U. S. 221.

But that seems not an appropriate remedy when the Secretary of the Treasury is ready to do his duty in that regard, except for the unlawful interference by the Supreme Court of the District of Columbia. It should be resorted to only if he hesitates after the interference is removed by this proceeding. Such action by the Commonwealth would not be a remedy in the suit, but an independent proceeding in disregard of the suit.

If the Commonwealth of Massachusetts does nothing, and the Supreme Court of the District of Columbia, in the course of time, dismisses the plaintiff's bill, he will have an appeal to the Court of Appeals, and, after that, to this Court. Should the Supreme Court of the District of Columbia make a decree in conformity with the prayer of the bill, it might be that the Secretary of the Treasury would not feel himself aggrieved and would not appeal.

The Commonwealth of Massachusetts cannot voluntarily appear in the suit and plead to the merits. Its acquiescence would not give the federal court a jurisdiction, which is forbidden by the Eleventh Amendment. A decree in its favor would not be a bar to another suit by John B. Cotton in the only court of competent jurisdiction, the Superior Court of Massachusetts. Besides, no officer of Massachusetts has authority to consent that it be sued outside its own court.

U. S. *v.* Lee, 106 U. S. 196, 205.

Suppose the Commonwealth of Massachusetts should appear specially and move to dismiss the suit for lack of jurisdiction. John B. Cotton would have his tedious appeals from a decree dismissing the bill, while from a decree overruling its motion, the Commonwealth, it seems, would have no appeal.

Georgia *v.* Jesup, 106 U. S. 458.
South Carolina *v.* Wesley, 155 U. S. 542.

It cannot be the law that a State which cannot be made a party before the federal court may have its rights affected by a suit like the present, unless, by a suggestion made to that very court, it succeeds in getting the suit dismissed.

Such a suggestion is not necessary as a preliminary step

before applying for prohibition when the lack of jurisdiction appears on the face of the proceedings below.

Bacon Ab., Title Prohibition, K.

See an elaborate discussion of this point in *Mayor and Aldermen of London* v. *Cox*, L. R. 2 H. L. 239, 275–292.

Judicial procedure in the United States would be liable to great reproach if it did not afford a prompt and effectual remedy at once to put an end to an action brought in violation of the Constitution of the United States and of the universal principle by which all civilized countries are governed, that a sovereign can be sued only by its own consent.

The great delay attending the reversal in the usual way of a decree made without jurisdiction has been held in this court sufficient reason for resorting to an extraordinary remedy.

Gaines *v.* Rugg, 148 U. S. 228, 243.

The Commonwealth of Massachusetts asserts that, being an indispensable party to a suit in which it cannot be impleaded, it is entitled, as of right, having no other adequate remedy, to a writ of prohibition or a writ of mandamus.

Shortt on Prohibition, pp. 440, 455.

Were this the Court of King's Bench in England, all the questions arising upon the petition would be concluded by authority of *In the Matter of Wadsworth and the Queen of Spain* and *In the Matter of De Haber and the Queen of Portugal*, 17 Q. B. 171. These were applications to the Queen's Bench for writs of prohibition to the Lord Mayor's Court of the city of London. One Wadsworth sued the Queen of Spain in the Lord Mayor's Court for interest on Spanish government bonds, and attached money of the Span-

ish government in the hands of London bankers, garnishees. De Haber sued the Queen of Portugal for money taken from him by the Portugaese Government under a court decree, and attached funds of that government in the possession of London bankers, garnishees. In the case of the Queen of Spain, the garnishees applied for the writ of prohibition, while the Queen of Portugal herself, without appearing before the Lord Mayor's Court for any purpose, applied for the writ.

It was argued against the rule to show cause, in substance as follows: —

Assuming that in some stage of the case the queen might interpose and allege something to defeat the action, a prohibition cannot go. The Lord Mayor's Court has jurisdiction in this kind of a proceeding. No application has been made to the Lord Mayor's Court, because the queen cannot be sued there. If the objection is taken on trial, the Lord Mayor's Court will deal with it and it may be brought before a court of error. The proper mode of defence on the part of the queen would have been to appear and put in a plea. The present question is not between the plaintiff and the queen, but between the plaintiff and the garnishee. The defendant cannot have a prohibition, for want of jurisdiction before appearing in the inferior court, and the garnishee, to take advantage of the objection, should plead it there. The prohibition will then go, if the inferior court refuse the plea, so as to show unequivocally an intention to exceed the jurisdiction.

At the close of the argument the Lord Chief Justice, Lord Campbell, said (page 203): —

We will take time to consider our judgment. But without prejudice to any point which has been argued in this case, I must express very great regret that the action should have been brought. I have no hesitation in saying that such actions do not lie; and I am very

sorry to find that this has been persisted in. The only question is as to the proper mode of stopping it, whether by a plea in the court below or by prohibition.

Application for prohibition was made April 15, 1851. Lord Campbell delivered the judgment of the court, making the rule absolute in both cases, May 28, 1851. The Lord Chief Justice said (page 207): —

An action cannot be maintained in any English Court against a foreign potentate, for anything done or omitted to be done by him in his public capacity as representative of a nation of which he is the head; and that no English Court has jurisdiction to entertain any complaints against him in that capacity. Redress for such complaints affecting a British subject is only to be obtained by the laws and tribunals of the country which the foreign potentate rules, or by the representations, remonstrances or acts of the British Government. To cite a foreign potentate in a municipal court, for any complaint against him in his public capacity is contrary to the law of nations, and an insult which he is entitled to resent.

(Page 214:) We have now to consider whether we can grant the prohibition on the application of the Queen of Portugal before she appears in the Lord Mayor's Court. . . . It would be very much to be lamented if, before doing justice to her, we were obliged to impose a condition upon her, which would be a further indignity and a further violation of the law of nations. If the rule were that the application for a prohibition can only be by the defendant after appearance, we should have had little scruple in making this an exception to the rule. But we find it laid down in books of the highest authority that, where the court to which the prohibition is to go has no jurisdiction, a prohibition may be granted upon the request of a stranger as well as of the defendant himself. . . . What has been done in this case, by the Lord Mayor's Court, must be considered as peculiarly in contempt of the Crown, it being an insult to an independent sovereign, giving that sovereign just cause of complaint to the British Government and having a tendency to bring about a

misunderstanding between our own gracious Sovereign and her ally, the Queen of Portugal. Therefore, upon the information and complaint of the Queen of Portugal, either as the party grieved, or as a stranger, we think we are bound to correct the excess of jurisdiction brought to our notice, and to prohibit the Lord Mayor's Court from proceeding further in this suit.

(Page 219:) Judicial procedure in England would have been liable to great reproach had it not afforded a prompt and effectual remedy at once to put an end to actions brought in perversion of the ancient and laudable custom of foreign attachment in the city of London, and in violation of the universal law by which all civilized nations are bound. It gives us great satisfaction, therefore, to be able, consistently with the decisions of our predecessors and the principles by which they have been guided, to grant the relief which is prayed. If we had entertained any grave doubt upon the subject we should have directed the applicant to declare in prohibition; but being clearly of opinion that there is an excess of jurisdiction in the Court below, of which he is entitled to complain before us, it is our duty simply to make the rule absolute.

The principle of these cases is precisely the same as that of the present application. The suit which the Commonwealth seeks to prohibit is a perverted garnishment in which the plaintiff, by asserting a lien on the warrant, tries to tie up money due from the United States to the Commonwealth of Massachusetts.

In England nothing except the unwritten law of international comity denied to the Lord Mayor's Court jurisdiction of such suits against the property of an independent sovereign. Yet Justice Willes said of those two suits that the entertainment of them brought scandal upon the law of England. (*Mayor and Aldermen of London* v. *Cox*, L. R. 2 H. L. 239, at 267.) The Commonwealth of Massachusetts cannot apply to the State department and complain against this affront to its sovereignty in the courts of the District

of Columbia, because when it came into the Union it yielded the right to deal thus with the diplomatic head of the District of Columbia. But in return for the rights which it gave up it received under the Constitution, according to its true interpretation, now secured by the Eleventh Amendment, protection of the right not to be made to suffer delay and outrage from the pendency of a suit against it, directly affecting its public funds, in a court of the District of Columbia. The only power which it can invoke is the power of the Supreme Court of the United States to declare, and make its declaration promptly effective, that by no indirect abuse of this assumed jurisdiction can the guaranteed right of a sovereign State be delayed and obstructed.

III.

The Supreme Court of the United States has Jurisdiction to issue the Writ of Prohibition in the Present Case.

The Supreme Court has power to issue a writ of prohibition, not only to the district courts proceeding as courts of admiralty and maritime jurisdiction under the express authority of Revised Statutes, section 688, but also, in the exercise of "inherent general power," to the courts of the District of Columbia when it is the appropriate remedy. The quoted phrase is from the opinion of the Chief Justice in *In re Vidal*, 179 U. S. 126; see also *Ex parte Joins*, 191 U. S. 93.

If express authority be needed, other than that existing in the Constitution of the United States, Article III., and the creation of the Supreme Court of the United States and the Supreme Court of the District of Columbia, with their respective powers, it may be found in Revised Statutes, section 716: —

The Supreme Court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

This statute is construed by this court to mean, not the exclusion of power to issue such writs, unless they are necessary for the exercise of its appellate jurisdiction, but the grant of power to issue them when agreeable to the usages and principles of law, as well as when necessary for the exercise of its jurisdiction.

See the opinion of the Chief Justice in *In re* Chetwood, 165 U. S. 443.

By section 14 of the Judiciary Act of Sept. 24, 1789 (1 Stat. 81, c. 20), carried forward as section 716 of the Revised Statutes, this court and the Circuit and District courts were empowered by Congress "to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law;" and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *American Construction Co.* v. *Jacksonville Railroad Co.*, 148 U. S. 372, 380. And although, as observed in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to 26 Stat. 826, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice. Tidd's Prac. *398; Bac. Ab., Certiorari.

Since the Chief Justice, in the later case of *In Re Tampa Suburban Railway*, 168 U. S. 583, has hinted that the issuance of the writ in *Chetwood's case* was really because it was necessary for the exercise of the appellate jurisdiction

of the Supreme Court, and since the only case in which the writ of prohibition has been held suitable to any court other than a district court sitting as a court of admiralty and maritime jurisdiction (*Bronson* v. *LaCrosse Railroad Co.*, 1 Wall. 405) may be put upon the same ground, it seems that it has never become necessary for this court to decide whether it may issue such a writ to an inferior federal court other than a District Court when the writ is agreeable to the usages and principles of law as demonstrated in the Court of King's Bench in England.

In every case in this court where the remedy of prohibition has been denied, there has been a meritorious reason for denying it, without dealing with the court's jurisdiction to issue it.

The cases, taking them up in chronological order, are as follows: —

Ex parte Christy, 3 How. 292 (1845):

Petition for prohibition to the district court sitting as a court of bankruptcy. Denied, because the district court had jurisdiction of the case before it.

Ex parte Gordon, 1 Black, 503 (1861):

Petition for prohibition to the circuit court in a capital case of piracy. Denied, because the circuit court had jurisdiction.

Bronson v. *LaCrosse Railroad Co.*, 1 Wall. 405 (1863):

An appeal was taken to the Supreme Court of the United States from an order of a district court in an equity suit to foreclose a railroad mortgage. Notwithstanding the appeal the district court proceeded to enforce the order. On application for the writ of prohibition the court withheld the writ to give the lower court opportunity to desist in accordance with the opinion, leave being given counsel, however, to

apply for the writ if necessary. Held, that the district court had no jurisdiction.

United States v. *Hoffman*, 4 Wall. 158 (1866):

Petition for prohibition to a district court sitting as a court of admiralty. Denied, because the application was made too late, the district court having already disposed of the case.

Ex parte Graham, 10 Wall. 541 (1870):

Petition for prohibition to a district court which had taken jurisdiction of a proceeding *in rem* to confiscate real estate under the act of July 7, 1862, entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, etc." The act declared that such proceedings should be *in rem*, and should conform as near as may be to proceedings in admiralty. Petition denied. The court said that it had no authority to issue a writ of prohibition except to district courts when proceeding as courts of admiralty, thus disregarding *Bronson's case*, 1 Wall. 405; but it is apparent that under the statute the district court had jurisdiction of the proceeding *in rem*.

Ex parte Warmouth, 17 Wall. 64 (1872):

Petition for prohibition to the circuit court in equity. This court had restrained one McEnery from acting as governor of Louisiana or setting up any claim to that office, upon a petition by his political adversary who had received the next highest number of votes, brought under the statute of May 31, 1870 (16 Stat. at L. 140), an act to enforce the right of citizens of the United States to vote in the several States of this union, and for other purposes. The petition was denied because an appeal was the proper remedy, the court below being expressly given jurisdiction by the statute. The statute provided, in section 23, that when any person was deprived of his election to any office by reason

of the denial to any citizen of his right to vote, on account of race, color or previous condition of servitude, he might bring any appropriate suit to recover possession of the office, in the circuit court of the United States, and provided that the circuit court should have, concurrently with the State court, jurisdiction thereof.

Ex parte Easton, 95 U. S. 68 (1877):

Petition for prohibition to the district court sitting as a court of admiralty to restrain it from proceeding to enforce a lien for wharfage. Denied, because the district court had jurisdiction, the contract for wharfage being a maritime contract. Whether the lien existed was, therefore, a question for its determination.

Ex parte Gordon, 104 U. S. 515 (1881):

Petition for prohibition to the district court sitting as a court of admiralty to restrain it from assessing damages for the death of a person, caused by maritime tort. Denied, because the district court had jurisdiction.

Ex parte Ferry Co., 104 U. S. 519 (1881):

This case is similar to *Ex parte Gordon*, *supra*, except that the amount of damage assessed was too small for appeal. The court said: —

> If there is jurisdiction and no provision for appeal or writ of error, the judgment of the trial court is the judgment of the court of last resort and concludes the parties.

Ex parte Hagar, 104 U. S. 520 (1881):

Petition for prohibition to the district court sitting as a court of admiralty. Denied, because that court had jurisdiction, the matter in dispute being a pilot's claim.

Ex parte Slayton, 105 U. S. 451 (1881):

Petition for prohibition to a district court sitting as a court

of admiralty. Denied, because the court had jurisdiction of a petition to limit liability.

Ex parte Pennsylvania, 109 U. S. 174 (1883):

This case is like *Ex parte Hagar*, *supra*.

Ex parte Boyer, 109 U. S. 629 (1884):

Petition for prohibition to the district court sitting as a court of admiralty. Denied, because that court had jurisdiction.

Chesapeake & Ohio Railroad Co. v. *White*, 111 U. S. 134 (1883):

Petition for prohibition "or such other proceeding as may be deemed appropriate" to a State court, and the plaintiffs therein, prohibiting them from further proceeding in a suit in which the petitioner was defendant, on the ground that the cause had been properly removed to the federal courts, and that the substantial rights of the parties were involved in a suit pending in the Supreme Court, namely, a writ of error to the highest State court, the Court of Appeals, which, by mandamus, had ordered the State court to proceed with the case. Petition denied in substantially the following language: —

Our proceedings in this suit must be confined to such as relate to a review of the judgment of the Court of Appeals and the enforcement of any order we may make upon the final hearing. The judgment of this court would not be a prohibition to the State court against proceeding, but only a refusal to order it to proceed. If a mandamus were refused by this court on the writ of error the plaintiff below would not be guilty in law of contempt if, notwithstanding refusal, he applied again to the State court to proceed to the trial. The State court did not abandon its jurisdiction. It still retained the suit. If a sufficient cause for removal was made in the State court, the rightful jurisdiction of that court is gone and cannot properly proceed further; but if it does proceed and does force the

defendant who applied for the removal to a trial, the remedy is by a writ of error after final judgment, and not by prohibition or punishment for contempt.

Ex parte Phenix Insurance Co., 118 U. S. 610 (1886):

Petition for writ of prohibition to the district court sitting in admiralty to restrain it from taking further jurisdiction of a petition by the owner of a steam vessel for the trial of the question of his liability for damage caused to buildings on land, by fire set by sparks from the vessel's smoke-stack. The writ issued because the court had no jurisdiction, the tort not being a maritime tort. The court said: —

> The case is clearly one for a writ of prohibition, as the want of jurisdiction appears on the face of the proceedings.

In re Baiz, 135 U. S. 403 (1890):

Petition for prohibition to the district court to restrain it from proceeding with a suit for libel against the petitioner, who claimed to be a public minister. Denied, after full consideration of the merits, the facts showing that the petitioner was not a public minister, because the court had jurisdiction against him.

In re Cooper, 138 U. S. 404 (1890):

Petition for prohibition to a district court sitting as a court of admiralty. A rule was issued to show cause.

In re Garnett, 141 U. S. 1 (1890):

Petition for prohibition to a district court sitting as a court of admiralty. Denied, because the court had jurisdiction of a petition to limit liability for loss on the Savannah River.

In re Fassett, 142 U. S. 479 (1891):

Petition for prohibition to a district court sitting as a court of admiralty. Denied, because that court had jurisdiction.

In re Cooper, 143 U. S. 472 (1891):

This is the same case as *In re Cooper*, *supra*, heard upon the return of the rule to show cause. Petition denied, because the petitioner had an adequate remedy by appeal, *which, through negligence, he had failed* to secure. The district court had jurisdiction.

In re Engles, 146 U. S. 357 (1892):

This case is like *In re Fassett*, *supra*.

In re Morrison, 147 U. S. 14 (1892):

Petition for prohibition and mandamus. Both denied, — mandamus because the petitioner had an adequate remedy in the ordinary course; prohibition because the court below had jurisdiction. The suit was a libel to limit liability. The court said: —

> As the District Court of Massachusetts had jurisdiction in the premises, we will not prohibit it from proceeding in the exercise of such jurisdiction. A writ of prohibition would be issued only in case of a want of jurisdiction, either of the parties or of the subject-matter of the proceeding.

In re Rice, 155 U. S. 396 (1894):

Petition for a writ of prohibition to a circuit court to prohibit it from further proceeding upon a receiver's petition, and for a writ of mandamus directing the circuit judge to restore the parties to their original positions and thereafter to proceed according to law. The court decided the case upon the merits, without discussing the question of jurisdiction. Fuller, C. J.: —

> Without discussing the various matters urged upon our attention by counsel for the petitioner, it is sufficient to say that we are of opinion that the leave asked for cannot be granted.
>
> 1. Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled

to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a *stranger, the granting or refusal of the* writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings. *Smith* v. *Whitney*, 116 U. S. 167, 173; *In re Cooper*, 143 U. S. 472, 495. Tested by these rules, we are clear that a proper case is not made for awarding the writ of prohibition.

2. The writ of mandamus cannot be issued to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction. The writ cannot be used to perform the office of an appeal or writ of error, even if no appeal or writ of error is given by law. *American Construction Company* v. *Jacksonville Railway*, 148 U. S. 372, 379.

In re New York, etc., Steamship Co., 155 U. S. 523 (1894):

Petition for prohibition to a district court sitting as a court of admiralty. Denied, because that court had jurisdiction.

In re Alix, 166 U. S. 136 (1896):

Petition for prohibition to a district court sitting as a court of admiralty, brought by an intervenor in a libel. Denied, under the test of the quotation in *Rice's case, supra.*

In re Huguley Mfg. Co., 184 U. S. 297 (1901):

Petition for prohibition to a circuit court to restrain it from taking any further steps in a bill ancillary to a bill of foreclosure, and for mandamus requiring a circuit court to dismiss the bill. Fuller, C. J.: —

It is firmly established that where it appears that a court, whose action is sought to be prohibited, has clearly no jurisdiction of the cause originally, a party who has objected to the jurisdiction at the

outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, the granting or refusal of the writ is discretionary. *In re Rice*, 155 U. S. 396. And that the writ of mandamus cannot be used to perform the office of an appeal or writ of error, and is only granted as a general rule where there is no other adequate remedy. *In re Atlantic City Railroad Company*, 164 U. S. 633.

And it may be added that it is also the general rule as to the writ of certiorari when sought as between private parties and on the ground that the proceedings below are void, that it will be granted or denied in the sound discretion of the court, and will be refused where there is a plain and adequate remedy by appeal or otherwise. *In re Tampa Suburban Railroad Company*, 168 U. S. 583.

In this case there was under the act of Congress of June 6, 1900, 31 Stat. 660, c. 803, a plain and adequate remedy by appeal to the Circuit Court of Appeals for the Fifth Circuit from the interlocutory order granting an injunction. After a final decree an appeal to this court would lie in respect of the jurisdiction if the question were properly raised and certified, or if issues were raised and decided bringing the case within section 5 of the act of March 3, 1891; or to the Circuit Court of Appeals. The case as presented is far from being one in which we should regard it as a proper exercise of our jurisdiction to interfere with the orderly progress of the suit below by the issue of either of the writs applied for. *In re New York and Porto Rico Steamship Company, Petitioner*, 155 U. S. 523, 531.

Ex parte Joins, 191 U. S. 93 (1903):

Petition for prohibition and for a writ of certiorari in aid of the same, to the members of the Choctaw and Chickasaw Citizenship Court. Denied, because the cause in the Citizenship Court was ended before the present application was heard. Holmes, J.: —

It is unnecessary to state the objections to the law more in detail, because we are of opinion that the writ must be denied irrespective

of these questions. We need not consider whether the jurisdiction of this court to grant a writ of prohibition to the District Courts is confined to cases where those courts are "proceeding as courts of admiralty and maritime jurisdiction." Rev. Stat., § 688; *Ex parte The City Bank of New Orleans*, 3 How. 292, 322; *Ex parte Gordon*, 1 Black, 503; *Ex parte Graham*, 10 Wall. 541; *Ex parte Easton*, 95 U. S. 68. As to the jurisdiction in other cases, whether inherent or under Rev. Stat., section 716, see *In re Rice*, 155 U. S. 396; *In re Hagaley Manufacturing Co.*, 184 U. S. 297; *In re Chetwood*, 165 U. S. 443, 462. Again we need not consider whether the Citizenship Court is a court in such a sense as to be subject to prohibition. See *In re Vidal*, 179 U. S. 126; *Gordon* v. *United States*, 2 Wall. 561; *S. C.*, 117 U. S. 697, 702. However these things may be, it is clear that the writ will not issue after the cause is ended, and that the cause in the Citizenship Court was ended before the present application was heard.

It is insisted, in view of the elaborate discussion of these applications for prohibition in late years, that the dicta of the early cases, to the effect that the Supreme Court of the United States has no authority to issue a writ of prohibition to a district court except when it is sitting as a court of admiralty, or to lower federal courts generally except in cases where the issuance may be necessary for the exercise of this court's jurisdiction, are not now to be regarded, and that this court has full authority to issue the writ whenever its issuance is agreeable to the usages and principles of law.

It is, however, unnecessary to decide whether the Supreme Court of the United States has jurisdiction to issue a writ to the circuit court of the United States or to any court other than inferior courts of the District of Columbia. As the highest judicial tribunal within the District of Columbia, from the analogy which it bears to the highest court of Maryland, it has the same power over inferior courts of the District of Columbia that the highest court of Maryland

had, at the time of the creation of the District of Columbia, over its subordinate tribunals.

See United States *v.* Schurz, 102 U. S. 378.

At the time the District of Columbia was created, the highest court of Maryland had all the powers of the Court of King's Bench in England.

Runkel *v.* Winemiller, 4 Harris & M'Henry, 449.

Price *v.* State, 8 Gill, 295, 310.

Kendall *v.* United States, 12 Peters, 524, 620, 631.

The common law of Maryland remained in force in the District of Columbia.

Kendall *v.* United States, 12 Peters, at pp. 614, 621.

The power of the proper tribunals in the District of Columbia to issue writs of prohibition has never been taken away by statute.

See Smith *v.* Whitney, 116 U. S. 167, at p. 175 (semble).

Deffer *v.* Kimball, 7 App. D. C. 499.

The decision in *Marbury* v. *Madison*, 1 Cranch, 137, that Congress had no power to extend the original jurisdiction of this court to writs of mandamus against executive officers, has no application to this court's authority over *constitutional courts* subordinate to it within the District of Columbia.

IV.

If, as we contend, the proper remedy for the Commonwealth of Massachusetts is prohibition, and, if necessary, certiorari in aid of it, it is immaterial to consider whether

mandamus will lie to compel the judges of the Supreme Court of the District of Columbia to dismiss the Cotton bill.

But if this court declares that it has no jurisdiction to issue a writ of prohibition in the present case, then we contend that the only adequate remedy is a writ of mandamus, as prayed in the petition.

Revised Statutes, section 688, provides: —

> The Supreme Court shall have power to issue writs of prohibition in the district courts when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States or to persons holding office under the authority of the United States where a State or an ambassador or other public minister, or a consul or vice-consul, is a party.

It is elementary that mandamus is the proper remedy to require a court to assume jurisdiction of a case which properly belongs to it, or to decide a matter which is properly before it.

Hollon Parker, petitioner, 131 U. S. 221.
Chateaugay Iron Co., petitioner, 128 U. S. 544.
Ex parte Parker, 120 U. S. 737.
Ex parte Morgan, 114 U. S. 174.
Ex parte Burtis, 103 U. S. 238.
Ex parte Railway Co., 101 U. S. 711.
Ex parte Flippin, 94 U. S. 348, 350.
In re Hohorst, petitioner, 150 U. S. 653.

Since it is the proper remedy to compel a court to assume jurisdiction, where it possesses it, it is the proper remedy and should issue to compel a court to dismiss a case where it does not possess jurisdiction, *if the petitioner has no remedy by appeal, writ of error, or writ of prohibition.*

In *Virginia* v. *Rives*, 100 U. S. 313, this court issued a mandamus to the judge of a circuit court requiring him to

deliver two negroes to the State jailer. The State prosecutions against them had been removed into the federal court, which had taken jurisdiction of them without authority. The petition for removal showed on its face that the circuit court had no jurisdiction. The court said that mandamus is a remedy when the case is outside of the exercise of the inferior court's discretion and outside of the jurisdiction of the court; that one of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds.

See also *Ex parte* Bradley, 7 Wall. 364, 375, *et seq.*
Ex parte Newman, 14 Wall. 152, 165.
In re Washington & Georgetown Railroad, 140 U. S. 91.
Gaines *v.* Rugg, 148 U. S. 228.
In re Grossmayer, 177 U. S. 48.

V.

The principle upon which our petition rests we believe to be one of the most important to the dignity of Massachusetts that our Commonwealth has ever asserted before any tribunal. That it may not be determined against Massachusetts upon this summary brief, but may be fully and adequately argued, we earnestly submit that we should be granted leave to file the petition and that a rule ought to issue in accordance with the prayer.

HERBERT PARKER,
Attorney-General.
FREDERICK H. NASH,
Assistant Attorney-General.

Office Supreme Court U. S.
FILED
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JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

ORIGINAL. OCTOBER TERM, 1904. No. 15.

In Re COMMONWEALTH OF MASSACHUSETTS,
PETITIONER.

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS.

HERBERT PARKER,
Attorney-General of Massachusetts.

FREDERICK H. NASH,
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Supreme Court of the United States.

ORIGINAL. OCTOBER TERM, 1904. **No. 15.**

In Re COMMONWEALTH OF MASSACHUSETTS, PETITIONER.

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS.

STATEMENT OF THE CASE.

Congress, on the twenty-seventh day of April, 1904, appropriated $1,611,740.85 to the Commonwealth of Massachusetts on account of the Commonwealth's expenses in defence of the Union. The Secretary of the Treasury, Leslie M. Shaw, drew a warrant for that sum, payable to the Governor of Massachusetts or order, and delivered it to John B. Cotton of Washington, D. C., who claimed to be entitled to receive from the Commonwealth of Massachusetts 10 per cent. of that amount, under a contract with Massachusetts whereby he was made its agent and attorney to present, prosecute and endeavor to recover before the Court of Claims, the Supreme Court of the United States and the Treasury Department of the United States, the claim of Massachusetts upon which that appropriation was based. This delivery was without notice to any one else represent-

ing Massachusetts, although only the Governor was authorized to receive payment of the warrant. John B. Cotton, claiming a lien on the fund appropriated and on the warrant for 10 per cent. of that amount, refused to turn over the warrant to the Governor until his claim should first be satisfied. The Governor demanded a duplicate warrant, but the Secretary of the Treasury refused to issue one, taking the position that his duty permitted him to assist a claim agent to coerce his client into settling all questions that might arise between them, at the agent's own terms. Upon the Governor's request, however, he took the opinion of the Attorney-General of the United States in the matter, and was advised that his delivery of the warrant to John B. Cotton was unauthorized by law, and that to pay the appropriation he might issue a duplicate warrant and deliver it to the Governor.

A copy of the Attorney-General's opinion is annexed to this brief, marked "A."

The day after the date of the Attorney-General's opinion, and before the Governor of Massachusetts was advised of it, and before the Secretary of the Treasury could issue a new warrant, John B. Cotton filed in the Supreme Court of the District of Columbia a bill in equity, in which the Secretary of the Treasury and the Governor of Massachusetts were named as defendants, setting forth his contract with the Commonwealth of Massachusetts, and asserting that he was entitled to enforce a lien upon the original warrant in his possession by perpetually restraining the Secretary of the Treasury from issuing a second warrant to the Governor or any one else in behalf of Massachusetts, and restraining the Governor of Massachusetts from asking or receiving one. At once the Supreme Court of the District of Columbia issued a rule commanding the parties named as defendants to show cause why they should not be thus enjoined. No

service upon the Governor of Massachusetts was made or attempted. Neither he nor the Commonwealth of Massachusetts has appeared in the suit. Upon the return day of the rule, Nov. 22, 1904, the hearing thereon was indefinitely postponed. This equity suit is still pending.

To remove the unlawful restraint upon the Secretary's conduct, effected by the action of the Supreme Court of the District of Columbia in taking jurisdiction of the equity suit, this petition is brought.

Argument.

I.

The Supreme Court of the District of Columbia has no Jurisdiction of John B. Cotton's Bill in Equity, and the Lack of Jurisdiction appears on the Face of the Bill.

The bill asserts a right in the plaintiff under a contract with Massachusetts to be paid by the State $161,174.09. Fearing that the State may have some defences to offer to his claim, and recognizing that he cannot garnish the funds in the treasury appropriated to Massachusetts, the plaintiff clings to the warrant which was delivered to him, and asserts the power to restrain the treasury department from paying the appropriation in any way except by cashing that particular warrant, which he refuses to give up to the only person who has authority to receive the cash for it.

The only standing which he asserts is based upon this contract, the other party to which is not John L. Bates, named as defendant in his suit, but the Commonwealth of Massachusetts.

The real and only party having an interest in the question whether the contract gives John B. Cotton any rights is the Commonwealth of Massachusetts.

The only tribunal in which any rights growing out of the contract may be adjudicated at the suit of John B. Cotton is the Superior Court of Massachusetts, where alone the Commonwealth has consented to be impleaded.

Eleventh Amendment to the United States Constitution.
Revised Laws of Massachusetts, c. 201.

The pending bill in equity is a suit against the State. Further, it is a suit in which the State is an indispensable party, without whose presence no decree between the other parties can be made, yet whose presence at the bar of the Supreme Court of the District of Columbia cannot be compelled.

Mathews, J., in *Hagood* v. *Southern*, 117 U. S. 52, 71, said: —

> The court cannot proceed to the determination of a cause and controversy to which the State is an indispensable party, without its presence.

In *Cunningham* v. *Macon & Brunswick R.R. Co.*, 109 U. S. 446, Miller, J., said: —

> Since a State cannot be sued without its consent, whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction.

The point we raise is one of jurisdiction in the true sense of the term, not one as to the proper exercise of jurisdiction.

A federal court of equity has no jurisdiction in a suit by A against X, based on A's alleged rights under his executory contract with a State. It has no "power to hear and determine the subject-matter in controversy between the

parties, to adjudicate or exercise any judicial power over them." (Baldwin, J., in *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 718.) Judge Baldwin said, in *Grignon's Lessee* v. *Astor*, 2 How. 338: —

> This is the line which denotes jurisdiction and its exercise; in cases *in personam*, where there are adverse parties, the court must have power over the subject-matter and the parties.

Even were the other party to this contract an individual who could not be made a party to the bill, instead of a State, jurisdiction would be lacking.

In *Mallow* v. *Hinde*, 12 Wheat. 193, the plaintiffs, claiming a right to land by virtue of executory contracts concerning a survey, sought to enjoin the defendant, who held a government patent to the land, from obtaining judgments against them in ejectment suits. A decree of the Circuit Court dismissing the bill was affirmed, on the ground that any decree upon the plaintiffs' rights under those contracts, the validity and obligation of which the parties to them had a right to contest, without hearing the parties to them, would be "contrary to all the rules which govern courts of equity, and against the principles of natural justice."

See also *Findley* v. *Hinde*, 1 Pet. 241, 246.
Shields v. *Barrow*, 17 How. 130.
Barney v. *Baltimore*, 6 Wall. 280.

In *Florida* v. *Georgia*, 17 How. 478, 507, 508, Curtis, J., by way of illustration, said: —

> Take the case of a suit between a citizen of Florida and a citizen of Georgia, in the course of which it appears that an inhabitant of this district who is not competent to sue, or capable of being sued, has such an interest in the controversy that the court can make no decree between the parties before them without affecting

that interest; has it ever been supposed that there was any implied power granted by the Constitution and the eleventh section of the Judiciary Act of 1789 to make him a party, or has the conclusion been that in all such cases the court cannot act at all? The latter, I apprehend, is the settled conclusion.

In *Ribon* v. *Railroad Cos.*, 16 Wall. 446, it is said: —

The rule in equity as to parties defendant is that all whose interests will be affected by the decree sought to be obtained must be before the court; and, if any such persons cannot be reached by process, — do not voluntarily appear, or, from a jurisdictional objection going to the person in the courts of the United States, cannot be made parties, — the bill must be dismissed. Where a decree can be made as to those present, without affecting the rights of those who are absent, the court will proceed. But if the interests of those present and of those absent are inseparable, the obstacle is insuperable.

The provisions of the Revised Statutes of the United States, section 738, do not displace the above fundamental principle of jurisprudence.

Gregory v. *Stetson*, 133 U. S. 579, 586.

In this case Mr. Justice Lamar said: —

In the case before us we are unable to see how any final decree could be rendered affecting the parties to the contract sued on without making them all parties to the suit. It is an elementary principle that the court cannot adjudicate directly upon a person's right without having him either actually or constructively before it. This principle is fundamental. . . . The point was made . . . that Mrs. Pike being a non-resident and beyond the jurisdiction of the court, it was impossible to join her as a party defendant to this suit, and that it was, therefore, unnecessary to attempt to do so. The court below ruled against the complainant on this point, and we see no

error in that ruling. The general question involved therein has been before this court a number of times, and it is now well settled that, notwithstanding the statute referred to (Rev. Sts., §738), and the forty-seventh equity rule, a Circuit Court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby. (*Shields* v. *Barrow*, 17 How. 130, 141, 142; *Coiron* v. *Millaudon*, 19 How. 113, 115, and cases there cited.)

In *California* v. *Southern Pacific Railroad Co.*, 157 U. S. 229, 249, *et seq.*, the chief justice, dismissing an original bill for want of parties who ought to be joined but could not be joined without ousting the jurisdiction of the court, said: —

It was held, *Mallow* v. *Hinde*, 12 Wheaton, 193, 198, that where an equity cause may be finally decided between the parties litigant without bringing others before the court who would, generally speaking, be necessary parties, such parties may be dispensed with in the Circuit Court if its process cannot reach them, or if they are citizens of another State; but if the rights of those not before the court are inseparably connected with the claim of the parties litigant, so that a final decision cannot be made between them without affecting the rights of the absent parties, the peculiar constitution of the Circuit Court forms no ground for dispensing with such parties. And the court remarked: "We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must apply equally to all courts of equity, whatever may be their structure as to jurisdiction. We put it upon the ground that no court can adjudicate directly upon a person's right without the party being actually or constructively before the court."

Mr. Justice Harlan, dissenting, in the same case stated the effect of the court's decision as follows: —

Upon that ground alone it is held that we are without jurisdiction to pass a final decree as between the State and the defendant corporation.

The question which we raise is not "Has John B. Cotton shown a right to the relief which he seeks?" but "Has the federal court authority to determine whether or not he has shown such a right?" In maintaining the negative we have satisfied one test that the difficulty is jurisdictional.

People v. *Sturtevant*, 9 N. Y. 263, 269.

Then, too, any decree of the Supreme Court of the District of Columbia upon this bill could be collaterally attacked as void. Suppose that court should enjoin the Secretary of the Treasury from paying the appropriation by a duplicate warrant, and should enjoin John L. Bates from asking or receiving such warrant; the Commonwealth of Massachusetts could then compel its issuance by a writ of mandamus from this court; and if the Supreme Court of the District of Columbia should commit both Mr. Shaw and Mr. Bates for contempt, they would be entitled to writs of habeas corpus.

These suggestions make it plain that the federal court's lack of power to decide even that John B. Cotton has a common law attorney's lien on the warrant, by virtue of his contract with Massachusetts, is lack of jurisdiction.

Any attempt to sustain the jurisdiction in such a case would subvert the very foundation on which the rule of equity requiring the joinder of the interested parties rests; for the decree would either have concluded, without a hearing, the interests of the only person really interested to contest it, or have delivered over the whole matter to new and independent litigation.

Story, Eq. Pl. § 83.

The necessity, in a bill of this nature, of having both parties to the contract before the court and subject to its

jurisdiction, is pointed out in *Price* v. *Forrest*, 173 U. S. 410, and in *Sanborn* v. *Maxwell*, 18 App. D. C. 245, 253.*

See also *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199.
Williams v. *Bankhead*, 19 Wall. 563.
Dodd v. *Una*, 40 N. J. Eq. 672, 709, 710–712.
Calvert, Parties in Equity, p. 10 *et seq.*
Daniell Chancery Practice (3d Amer. Ed.), pp. 285, 286.

Since the Supreme Court of the District of Columbia would have no jurisdiction of the bill were the other party to the contract an individual who could not be made a party to the suit, *à fortiori*, it has no jurisdiction when the other party is a State. If an indispensable party is lacking, who may come within the jurisdiction, it is proper to stay the suit, or dismiss the bill without prejudice; but if the indispensable party is a State, the court has no power to entertain the suit for any purpose.

The dictum in *Osborn* v. *Bank of United States*, 9 Wheaton 738, that a State is not a party within the prohibition of the Eleventh Amendment, unless it is a party on the record, and the twist given to that dictum by *Davis* v. *Gray*, 16 Wallace 203, to the effect that in an equity suit it is sufficient excuse for proceeding to a decree in the

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* The case of *McKee* v. *Lamon*, 159 U. S. 317, is not in point, because there it appeared that the Choctaw nation had, by resolve of its council, recognized the contract with its agent as valid, and had appropriated the amount of its agent's percentage fee thereunder, to the satisfaction of the contract obligation, and the whole percentage fee had been paid to one agent, although another was entitled to share in it. The controversy was solely between the two agents, and, as the court pointed out (page 322), the Choctaw nation had no longer any interest in the percentage fee.

absence of the State from the record, that it cannot be made a party, have no application to a suit where the State is the only real party against which a decree would effectively operate.

In re Ayers, 123 U. S. 443, 505, 506.

The classification of the cases upon the Eleventh Amendment has been so thoroughly made in *Pennoyer* v. *McConnaughy*, 140 U. S. 1, and *In re Tyler*, 149 U. S. 164, with the recent approval of the court in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, and *Tindal* v. *Wesley*, 167 U. S. 204, that argument seems unnecessary on the point that the present case comes within

Louisiana v. *Jumel*, 107 U. S. 711;
Cunningham v. *Macon & Brunswick R.R. Co.*, 109 U. S. 446;
Hagood v. *Southern*, 117 U. S. 52;
In re Ayers, 123 U. S. 443;
Christian v. *Atlantic & N. C. R. R. Co.*, 133 U. S. 233;
Belknap v. *Schild*, 161 U. S. 10;
Fitz v. *McGhee*, 172 U. S. 516;
Smith v. *Reeves*, 178 U. S. 436;
Minnesota v. *Hitchcock*, 185 U. S. 373;

and not within

United States v. *Peters*, 5 Cranch. 115.;
Osborn v. *Bank of United States*, 9 Wheat. 738;
Davis v. *Gray*, 16 Wall. 203;
Board of Liquidation v. *McComb*, 92 U. S. 531;
United States v. *Lee*, 106 U. S. 196;
Virginia Coupon Cases, 114 U. S. 270;
Pennoyer v. *McConnaughy*, 140 U. S. 1;
In re Tyler, 149 U. S. 164;

Reagan v. *Farmers' Loan & Trust Co.*, 154 U. S. 389;
Scott v. *Donald*, 165 U. S. 108;
Tindal v. *Wesley*, 167 U. S. 204;
Smyth v. *Ames*, 169 U. S. 517;
Illinois Central R.R. Co. v. *Adams*, 180 U. S. 28;
Missouri R.R. Co. v. *Missouri Railroad Commissioners*, 183 U. S. 53.

Since it is manifest upon the face of the bill that the defendant John L. Bates has no individual interest in the controversy, and that the relief sought against him is only in his official capacity as representing the Commonwealth of Massachusetts, which alone is to be affected by a decree and by the entertainment of the bill, the point that the suit is substantially against the State is not merely matter of defence, as in *Illinois Central R.R. Co.* v. *Adams*, 180 U. S. 28, but goes to the jurisdiction of the Supreme Court of the District of Columbia, and makes the restraint upon the Secretary's action, imposed by the pendency of the bill and the service upon him of the order to show cause, unlawful and void.

See especially *In re Ayers*, 123 U. S. 443, at 489.

II.

The Supreme Court of the District of Columbia having no Jurisdiction of the Subject-matter of the Bill, by Reason of the Exemption from Suit of an Indispensable Party, the Commonwealth's Remedy for the Usurpation of Jurisdiction is a Writ of Prohibition to the Judges of that Court.

It should be assumed, in favor of the Secretary of the Treasury, that when the obstruction created by the pendency of this bill is removed, he will at once issue the war-

rant demanded by Massachusetts, or in some other manner pay the appropriation. If he hesitates then, the Commonwealth will apply to this court, under its original jurisdiction of suits by a State against citizens of another State, for a writ of mandamus to compel him to pay it.

See *U. S. ex rel. Redfield* v. *Windham*, 137 U. S. 636. *Roberts* v. *U. S.*, 176 U. S. 221.

Of course the Commonwealth of Massachusetts might disregard any orders of the Supreme Court of the District of Columbia, and apply for such writ of mandamus at once. But it seems not an appropriate remedy to attack the Secretary, when the Supreme Court of the District of Columbia is the direct cause of the injury to the Commonwealth's right. The Commonwealth has no other remedy in the equity suit than to attack the jurisdiction of the court, whatever may be its remedies by independent proceedings in disregard of the equity suit.

If the Commonwealth of Massachusetts does nothing, and the Supreme Court of the District of Columbia, in the course of time, dismisses the plaintiff's bill, he will have an appeal to the Court of Appeals, and, after that, to this Court. Should the Supreme Court of the District of Columbia make a decree in conformity with the prayer of the bill, it might be that the Secretary of the Treasury would not feel himself aggrieved, and would not appeal.

It is to be noted that the able and experienced district attorney, of counsel for the Secretary of the Treasury, during all the time that intervened between the filing of the bill and the filing of this petition, offered no motions to strike the bill from the files or to dismiss it, but, so far as the record shows, seemed actually to take the bill seriously. Thus it appears that, if the Commonwealth does not move in the

case, this court may never have an opportunity to exercise its appellate jurisdiction.

The Commonwealth should not voluntarily appear in the suit, and plead to the merits. Even if its acquiescence would give the federal court a jurisdiction which is forbidden by the Eleventh Amendment (see *Clark* v. *Barnard*, 108 U. S. 436), no officer of Massachusetts has authority to consent that it be sued outside its own court.

U. S. v. *Lee*, 106 U. S. 196, 205.
Hagood v. *Southern*, 117 U. S. 52, 71.

A decree in favor of the Commonwealth on the merits would not be a bar to another suit by John B. Cotton in the only court of competent jurisdiction, — the Superior Court of Massachusetts.

It would be a waste of time for the Commonwealth to appear specially before the court of the district, and move to dismiss the suit as against both defendants for lack of jurisdiction. John B. Cotton would have his tedious appeals from a decree dismissing the bill, while from an order overruling its motion the Commonwealth would have no appeal.

Georgia v. *Jesup*, 106 U. S. 458.
South Carolina v. *Wesley*, 155 U. S. 542.

It cannot be law that a State which cannot be made a party before a federal court may have its right to immediate payment of an appropriation affected by such a suit as this, unless by a suggestion made to that very court it succeeds in getting the suit dismissed, and by compromising with the plaintiff prevails upon him to waive his appeal. See the remarks of Mathews, J., in *Hagood* v. *Southern*, 117 U. S. 52, as to the futility of arguing that the State has had opportunity to appear.

Such a suggestion is not necessary as a preliminary step before applying for a writ of prohibition, when the lack of jurisdiction appears on the face of the proceedings below.

This is decided upon an elaborate discussion of all prior English authorities in

Mayor and Aldermen of London v. *Cox*,
L. R., 2 H. L. 239, 275–292.

Judicial procedure in the United States would be liable to great reproach if it did not afford a prompt and effectual remedy at once to put an end to an action brought in violation of the Constitution of the United States, and of the universal principle by which all civilized countries are governed, that a sovereign can be sued only by its own consent.

The great delay attending the reversal in the usual way of a decree made without jurisdiction has been held in this court sufficient reason for resorting to an extraordinary remedy.

Gaines v. *Rugg*, 148 U. S. 228, 243.

Were this the Court of King's Bench in England, all the questions arising upon the petition would be concluded by authority of *In the Matter of Wadsworth and the Queen of Spain* and *In the Matter of De Haber and the Queen of Portugal*, 17 Q. B. 171. These were applications to the Queen's Bench for writs of prohibition to the Lord Mayor's Court of the city of London. One Wadsworth sued the Queen of Spain in the Lord Mayor's Court for interest on Spanish government bonds, and attached money of the Spanish government in the hands of London bankers, garnishees. De Haber sued the Queen of Portugal for money taken from him by the Portuguese government under a court decree, and attached funds of that government in the possession of London bankers, garnishees. In the case of the Queen of Spain, the garnishees applied for the writ of prohibition;

while the Queen of Portugal herself, without appearing before the Lord Mayor's Court for any purpose, applied for the writ.

It was argued against the rule to show cause, in substance as follows: —

Assuming that in some stage of the case the queen might interpose and allege something to defeat the action, a prohibition cannot go. The Lord Mayor's Court has jurisdiction in this kind of a proceeding. No application has been made to the Lord Mayor's Court, because the queen cannot be sued there. If the objection is taken on trial, the Lord Mayor's Court will deal with it and it may be brought before a court of error. The proper mode of defence on the part of the queen would have been to appear and put in a plea. The present question is not between the plaintiff and the queen, but between the plaintiff and the garnishee. The defendant cannot have a prohibition, for want of jurisdiction before appearing in the inferior court, and the garnishee, to take advantage of the objection, should plead it there. The prohibition will then go, if the inferior court refuse the plea, so as to show unequivocally an intention to exceed the jurisdiction.

At the close of the argument the Lord Chief Justice Lord Campbell, said (page 203): —

We will take time to consider our judgment. But without prejudice to any point which has been argued in this case, I must express very great regret that the action should have been brought. I have no hesitation in saying that such actions do not lie; and I am very sorry to find that this has been persisted in. The only question is as to the proper mode of stopping it, whether by a plea in the court below or by prohibition.

Application for prohibition was made April 15, 1851. Lord Campbell delivered the judgment of the court, making the rule absolute in both cases, May 28, 1851. The Lord Chief Justice said (page 207): —

An action cannot be maintained in any English court against a foreign potentate, for anything done or omitted to be done by him in his public capacity as representative of a nation of which he is the head; and that no English court has jurisdiction to entertain any complaints against him in that capacity. Redress for such complaints affecting a British subject is only to be obtained by the laws and tribunals of the country which the foreign potentate rules, or by the representations, remonstrances or acts of the British government. To cite a foreign potentate in a municipal court for any complaint against him in his public capacity is contrary to the law of nations, and an insult which he is entitled to resent.

(Page 214:) We have now to consider whether we can grant the prohibition on the application of the Queen of Portugal before she appears in the Lord Mayor's Court. . . . It would be very much to be lamented if, before doing justice to her, we were obliged to impose a condition upon her, which would be a further indignity and a further violation of the law of nations. If the rule were that the application for a prohibition can only be by the defendant after appearance, we should have had little scruple in making this an exception to the rule. But we find it laid down in books of the highest authority that, where the court to which the prohibition is to go has no jurisdiction, a prohibition may be granted upon the request of a stranger as well as of the defendant himself. . . . What has been done in this case, by the Lord Mayor's Court, must be considered as peculiarly in contempt of the Crown, it being an insult to an independent sovereign, giving that sovereign just cause of complaint to the British government, and having a tendency to bring about a misunderstanding between our own gracious Sovereign and her ally, the Queen of Portugal. Therefore, upon the information and complaint of the Queen of Portugal, either as the party grieved, or as a stranger, we think we are bound to correct the excess of jurisdiction brought to our notice, and to prohibit the Lord Mayor's Court from proceeding further in this suit.

(Page 219:) Judicial procedure in England would have been liable to great reproach had it not afforded a prompt and effectual remedy at once to put an end to actions brought in perversion of the ancient and laudable custom of foreign attachment in the city

of London, and in violation of the universal law by which all civilized nations are bound. It gives us great satisfaction, therefore, to be able, consistently with the decisions of our predecessors and the principles by which they have been guided, to grant the relief which is prayed. If we had entertained any grave doubt upon the subject, we should have directed the applicant to declare in prohibition; but, being clearly of opinion that there is an excess of jurisdiction in the court below, of which he is entitled to complain before us, it is our duty simply to make the rule absolute.

The principle of these cases is precisely the same as that of the present application. The suit which the Commonwealth seeks to prohibit is a perverted garnishment in which the plaintiff, by asserting a lien on the warrant, tries to tie up money due from the United States to the Commonwealth of Massachusetts.

In England nothing except the unwritten law of international comity denied to the Lord Mayor's Court jurisdiction of such suits against the property of an independent sovereign. Yet Justice Willes said of those two suits that the entertainment of them brought scandal upon the law of England. (*Mayor and Aldermen of London* v. *Cox*, L. R. 2 H. L. 239, at 267.) The Commonwealth of Massachusetts cannot apply to the State department and complain against this affront to its sovereignty in the courts of the District of Columbia, because when it came into the Union it yielded the right to deal thus with the diplomatic head of the District of Columbia. But, in return for the rights which it gave up, it received under the Constitution, according to its true interpretation, now secured by the Eleventh Amendment, protection of the right not to be made to suffer delay and outrage from the pendency of a suit against it, directly affecting its public funds, in a court of the District of Columbia. The only power which it can invoke is the power of the Supreme Court of the United States to de-

clare, and make its declaration promptly effective, that by no abuse of this assumed jurisdiction can the guaranteed right of a sovereign State be further delayed and obstructed.

III.

The Supreme Court of the United States has Power to issue the Writ of Prohibition to the Supreme Court of the District of Columbia, that being the Appropriate Remedy.

Probably this court has inherent power to issue the writ to restrain excesses of jurisdiction by inferior federal courts whose decrees are subject to its supervision. This valuable and ancient weapon ought not to be lacking to the judicial power of the United States. That this court has inherent powers cannot be doubted.

See *In re Vidal*, 179 U. S. 126.
Ex parte Joins, 191 U. S. 93.
Anderson v. *Dunn*, 6 Wheat. 204, 227.
Ex parte Robinson, 19 Wall. 505.

Express authority to issue the writ may be found in Rev. Sts., § 716: —

> The Supreme Court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

This statute has been construed by this court to intend, not the exclusion of power to issue such writs, unless they are necessary for the exercise of its appellate jurisdiction, but the grant of power to issue them when agreeable to the

usages and principles of law, as well as when necessary for the exercise of its jurisdiction.

See the opinion of the Chief Justice in *In re Chetwood*, 165 U. S. 443.

By section 14 of the Judiciary Act of Sept. 24, 1789 (1 Stat. 81, c. 20), carried forward as section 716 of the Revised Statutes, this court and the Circuit and District courts were empowered by Congress "to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law;" and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *American Construction Co.* v. *Jacksonville Railroad Co.*, 148 U. S. 372, 380. And, although, as observed in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to 26 Stat. 826, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice. Tidd's Prac. *398; Bac. Ab., Certiorari.

Since the Chief Justice, in the later case of *In re Tampa Suburban Railway*, 168 U. S. 583, has hinted that the issuance of the writ in *Chetwood's case* was really because it was necessary for the exercise of the appellate jurisdiction of the Supreme Court, and since the only case in which the writ of prohibition has been held suitable to any court other than a district court sitting as a court of admiralty and maritime jurisdiction (*Bronson* v. *LaCrosse Railroad Co.*, 1 Wall. 405) may be put upon the same ground, it seems that it has never become necessary for this court to decide whether it may issue such a writ to an inferior federal court other than a district court whenever the writ is agreeable to the usages and principles of law as demonstrated in the Court of King's Bench in England.

In every case in this court where the remedy of prohibition has been denied, there has been a meritorious reason for denying it, without dealing with the court's power to issue it.

The cases, taking them up in chronological order, are as follows: —

Ex parte Christy, 3 How. 292 (1845): —

Petition for prohibition to the district court sitting as a court of bankruptcy. Denied, because the district court had jurisdiction of the case before it.

Ex parte Gordon, 1 Black, 503 (1861): —

Petition for prohibition to the circuit court in a capital case of piracy. Denied, because the circuit court had jurisdiction.

Bronson v. *LaCrosse Railroad Co.*, 1 Wall. 405 (1863): —

An appeal was taken to the Supreme Court of the United States from an order of a district court in an equity suit to foreclose a railroad mortgage. Notwithstanding the appeal, the district court proceeded to enforce the order. On application for the writ of prohibition the court withheld the writ, to give the lower court opportunity to desist in accordance with the opinion, leave being given counsel, however, to apply for the writ if necessary. Held, that the district court had no jurisdiction.

United States v. *Hoffman*, 4 Wall. 158 (1866): —

Petition for prohibition to a district court sitting as a court of admiralty. Denied, because the application was made too late, the district court having already disposed of the case.

Ex parte Graham, 10 Wall. 541 (1870): —

Petition for prohibition to a district court which had taken jurisdiction of a proceeding *in rem* to confiscate real estate under the act of July 7, 1862, entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, etc." The act declared that such proceedings should be *in rem* and should conform as near as may be to proceedings in admiralty. Petition denied. The

court said that it had no authority to issue a writ of prohibition except to district courts when proceeding as courts of admiralty, thus disregarding *Bronson's case*, 1 Wall. 405; but it is apparent that under the statute the district court had jurisdiction of the proceeding *in rem*.

Ex parte Warmouth, 17 Wall. 64 (1872):—

Petition for prohibition to the circuit court in equity. This court had restrained one McEnery from acting as governor of Louisiana or setting up any claim to that office, upon a petition by his political adversary, who had received the next highest number of votes, brought under the statute of May 31, 1870 (16 Stat. at L. 140), an act to enforce the right of citizens of the United States to vote in the several States of this Union, and for other purposes. The petition was denied, because an appeal was the proper remedy, the court below being expressly given jurisdiction by the statute. The statute provided, in section 23, that when any person was deprived of his election to any office by reason of the denial to any citizen of his right to vote, on account of race, color or previous condition of servitude, he might bring any appropriate suit to recover possession of the office, in the circuit court of the United States, and provided that the circuit court should have, concurrently with the State court, jurisdiction thereof.

Ex parte Easton, 95 U. S. 68 (1877):—

Petition for prohibition to the district court sitting as a court of admiralty to restrain it from proceeding to enforce a lien for wharfage. Denied, because the district court had jurisdiction, the contract for wharfage being a maritime contract. Whether the lien existed was, therefore, a question for its determination.

Ex parte Gordon, 104 U. S. 515 (1881):—

Petition for prohibition to the district court sitting as a court of admiralty to restrain it from assessing damages for the death of a person, caused by maritime tort. Denied, because the district court had jurisdiction.

Ex parte Ferry Co., 104 U. S. 519 (1881):—

This case is similar to *Ex parte Gordon*, *supra*, except that the amount of damage assessed was too small for appeal.

Ex parte Hagar, 104 U. S. 520 (1881) : —

Petition for prohibition to the district court sitting as a court of admiralty. Denied, because that court had jurisdiction, the matter in dispute being a pilot's claim.

Ex parte Slayton, 105 U. S. 451 (1881) : —

Petition for prohibition to a district court sitting as a court of admiralty. Denied, because the court had jurisdiction of a petition to limit liability.

Ex parte Pennsylvania, 109 U. S. 174 (1883) : —

This case is like *Ex parte Hagar*, *supra*.

Ex parte Boyer, 109 U. S. 629 (1884) : —

Petition for prohibition to the district court sitting as a court of admiralty. Denied, because that court had jurisdiction.

Chesapeake & Ohio Railroad Co. v. *White*, 111 U. S. 134 (1883) : —

Petition for prohibition "or such other proceeding as may be deemed appropriate" to a State court, and the plaintiffs therein, prohibiting them from further proceeding in a suit in which the petitioner was defendant, on the ground that the cause had been properly removed to the federal courts, and that the substantial rights of the parties were involved in a suit pending in the Supreme Court, namely, a writ of error to the highest State court, the Court of Appeals, which, by mandamus, had ordered the State court to proceed with the case. Petition denied in substantially the following language : —

Our proceedings in this suit must be confined to such as relate to a review of the judgment of the Court of Appeals and the enforcement of any order we may make upon the final hearing. The judgment of this court would not be a prohibition to the State court against proceeding, but only a refusal to order it to proceed. If a mandamus were refused by this court on the writ of error, the plaintiff below would not be guilty in law of contempt, if, notwithstanding refusal, he applied again to the State court to proceed to the trial. The State court did not abandon its jurisdiction. It still retained the suit. If a sufficient cause for removal was made in the State court, the rightful jurisdiction of that court is gone, and cannot properly

proceed further: but if it does proceed, and does force the defendant who applied for the removal to a trial, the remedy is by a writ of error after final judgment, and not by prohibition or punishment for contempt.

Ex parte Phenix Insurance Co., 118 U. S. 610 (1886): —

Petition for writ of prohibition to the district court sitting in admiralty to restrain it from taking further jurisdiction of a petition by the owner of a steam vessel for the trial of the question of his liability for damage caused to buildings on land, by fire set by sparks from the vessel's smokestack. The writ issued because the court had no jurisdiction, the tort not being a maritime tort. The court said: —

"The case is clearly one for a writ of prohibition, as the want of jurisdiction appears on the face of the proceedings."

In re Baiz, 135 U. S. 403 (1890): —

Petition for prohibition to the district court to restrain it from proceeding with a suit for libel against the petitioner, who claimed to be a public minister. Denied, after full consideration of the merits, the facts showing that the petitioner was not a public minister, because the court had jurisdiction against him.

In re Cooper, 138 U. S. 404 (1890): —

Petition for prohibition to a district court sitting as a court of admiralty. A rule was issued to show cause.

In re Garnett, 141 U. S. 1 (1890): —

Petition for prohibition to a district court sitting as a court of admiralty. Denied, because the court had jurisdiction of a petition to limit liability for loss on the Savannah River.

In re Fassett, 142 U. S. 479 (1891): —

Petition for prohibition to a district court sitting as a court of admiralty. Denied, because that court had jurisdiction.

In re Cooper, 143 U. S. 472 (1891): —

This is the same case as *In re Cooper*, *supra*, heard upon the return of the rule to show cause. Petition denied, because the petitioner had an adequate remedy by appeal, which, through negligence, he had failed to secure. The district court had jurisdiction.

In re Engles, 146 U. S. 357 (1892) : —

This case is like *In re Fassett*, *supra*.

In re Morrison, 147 U. S. 14 (1892) : —

Petition for prohibition and mandamus. Both denied, — mandamus because the petitioner had an adequate remedy in the ordinary course; prohibition because the court below had jurisdiction. The suit was a libel to limit liability. The court said : —

"As the District Court of Massachusetts had jurisdiction in the premises, we will not prohibit it from proceeding in the exercise of such jurisdiction. A writ of prohibition would be issued only in case of a want of jurisdiction, either of the parties or of the subject-matter of the proceeding."

In re Rice, 155 U. S. 396 (1894) : —

Petition for a writ of prohibition to a circuit court to prohibit it from further proceeding upon a receiver's petition, and for a writ of mandamus directing the circuit judge to restore the parties to their original positions and thereafter to proceed according to law. The court decided the case upon the merits, without discussing the question of jurisdiction. Fuller, C. J. : —

"Without discussing the various matters urged upon our attention by counsel for the petitioner, it is sufficient to say that we are of opinion that the leave asked for cannot be granted.

"1. Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings. *Smith* v. *Whitney*, 116 U. S.

167, 173; *In re Cooper*, 143 U. S. 472, 495. Tested by these rules, we are clear that a proper case is not made for awarding the writ of prohibition."

In re New York, etc., Steamship Co., 155 U. S. 523 (1894):—
Petition for prohibition to a district court sitting as a court of admiralty. Denied, because that court had jurisdiction.

In re Alix, 166 U. S. 136 (1896):—
Petition for prohibition to a district court sitting as a court of admiralty, brought by an intervenor in a libel. Denied, under the test of the quotation in *Rice's case, supra.*

In re Hugulay Manufacturing Co., 184 U. S. 297 (1901):—
Petition for prohibition to a circuit court to restrain it from taking any further steps in a bill ancillary to a bill of foreclosure, and for mandamus requiring a circuit court to dismiss the bill. Fuller, C. J.:—

"It is firmly established that where it appears that a court, whose action is sought to be prohibited, has clearly no jurisdiction of the cause originally, a party who has objected to the jurisdiction at the outset, and has no other remedy, is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, the granting or refusal of the writ is discretionary. *In re Rice*, 155 U. S. 396. And that the writ of mandamus cannot be used to perform the office of an appeal or writ of error, and is only granted as a general rule where there is no other adequate remedy. *In re Atlantic City Railroad Company*, 164 U. S. 633.

"And it may be added that it is also the general rule as to the writ of certiorari, when sought as between private parties and on the ground that the proceedings below are void, that it will be granted or denied in the sound discretion of the court, and will be refused where there is a plain and adequate remedy by appeal or otherwise. *In re Tampa Suburban Railroad Company*, 168 U. S. 583.

"In this case there was under the act of Congress of June 6, 1900, 31 Stat. 660, c. 803, a plain and adequate remedy by

appeal to the Circuit Court of Appeals for the Fifth Circuit from the interlocutory order granting an injunction. After a final decree an appeal to this court would lie in respect of the jurisdiction if the question were properly raised and certified, or if issues were raised and decided bringing the case within section 5 of the act of March 3, 1891; or to the Circuit Court of Appeals. The case as presented is far from being one in which we should regard it as a proper exercise of our jurisdiction to interfere with the orderly progress of the suit below by the issue of either of the writs applied for. *In re New York and Porto Rico Steamship Company, Petitioner*, 155 U. S. 523, 531."

Ex parte Joins, 191 U. S. 93 (1903): —

Petition for prohibition and for a writ of certiorari in aid of the same, to the members of the Choctaw and Chickasaw Citizenship Court. Denied, because the cause in the Citizenship Court was ended before the present application was heard. Holmes, J.: —

"It is unnecessary to state the objections to the law more in detail, because we are of opinion that the writ must be denied, irrespective of these questions. We need not consider whether the jurisdiction of this court to grant a writ of prohibition to the district courts is confined to cases where those courts are 'proceeding as courts of admiralty and maritime jurisdiction.' Rev. Stat., § 688; *Ex parte The City Bank of New Orleans*, 3 How. 292, 322; *Ex parte Gordon*, 1 Black, 503; *Ex parte Graham*, 10 Wall. 541; *Ex parte Easton*, 95 U. S. 68. As to the jurisdiction in other cases, whether inherent or under Rev. Stat., section 716, see *In re Rice*, 155 U. S. 396; *In re Huguley Manufacturing Co.*, 184 U. S. 297; *In re Chetwood*, 165 U. S. 443, 462. Again, we need not consider whether the Citizenship Court is a court in such a sense as to be subject to prohibition. See *In re Vidal*, 179 U. S. 126; *Gordon* v. *United States*, 2 Wall. 561; *S. C.*, 117 U. S., 697, 702. However these things may be, it is clear that the writ will not issue after the cause is ended, and that the cause in the Citizenship Court was ended before the present application was heard."

It is insisted, in view of the elaborate discussion of these applications for prohibition in late years, that the dicta of the early cases, to the effect that the Supreme Court of the United States has no authority to issue a writ of prohibition except to a district court sitting as a court of admiralty, are not now to be regarded, and that this court has full authority to issue the writ whenever its issuance is agreeable to the usages and principles of law.

In the present case, however, it is unnecessary to invoke the power of this court to what we believe is its extent, for here the issuance of the writ is necessary for the exercise of its jurisdiction as a court of final appeal from the Supreme Court of the District of Columbia. (Act of Feb. 9, 1893, 27 Stat. 434.)

The latest discussion of Rev. Sts., § 716, known to us is found in

Barber Asphalt Paving Co. v. *Morris*, 132 Fed. 945.

The paving company sued the city of Duluth in the Circuit Court of the United States. The city council had already allowed its claim, but an appeal had been taken by taxpayers to the State Court. The judge of the Circuit Court stayed the paving company's suit until the final determination of the controversy in the State court. Thereupon the paving company applied to the Circuit Court of Appeals for a writ of mandamus, to compel the judge of the Circuit Court to try the case with all convenient speed. The writ was granted, after a carefully considered opinion by Judge Sanborn, overruling a prior decision of the same court and holding that in case of need the writ of mandamus, under authority of section 716, should issue in aid of a court's appellate jurisdiction whenever appellate jurisdiction exists, whether it has been invoked by appeal or not.

The opinion reviews all the decisions of the Supreme Court bearing upon this point, hence we rely upon it.

In the present case, the moment John B. Cotton's bill was filed, the power ultimately to review the proceedings in it became vested in this court, which in the exercise of its appellate jurisdiction had the power under section 716 to issue either mandamus or prohibition. If the court below has jurisdiction, and refuses to exercise it with reasonable diligence, mandamus will issue. If the court below has no jurisdiction, and assumes it, prohibition should issue. Suppose the court below should enjoin the Secretary of the Treasury, according to the prayer of the bill. It is conceivable that he, the only party having a right to appeal, might not choose to exercise it. It is more fitting that this state of affairs be remedied by prohibition in aid of this court's appellate jurisdiction, than by any mode of collateral attack.

It may, however, not be essential to determine whether this court's power to issue the writ to federal courts in general is inherent or derived from Rev. Sts., § 716. Since the common law has been adopted with respect to the District of Columbia, the highest court of appellate jurisdiction within the District has the same power over the inferior courts that the highest court of Maryland had, at the time of the creation of the District of Columbia, over its subordinate tribunals.

See *United States* v. *Schurz*, 102 U. S. 378.

At the time the District of Columbia was created, the highest court of Maryland had all the powers of the Court of King's Bench in England.

Runkel v. *Winemiller*, 4 Harris & M'Henry, 429, 449.

Price v. *State*, 8 Gill, 295, 310.

Kendall v. *United States*, 12 Peters, 524, 620, 631.

The common law of Maryland remained in force in the District of Columbia.

Kendall v. *United States*, 12 Peters, at pp. 614, 621.

The power of the proper tribunals in the District of Columbia to issue writs of prohibition has never been taken away by statute.

See *Smith* v. *Whitney*, 116 U. S. 167, at p. 175 (semble).
Deffer v. *Kimball*, 7 App. D. C. 499.

IV.

If this Court declines to issue a Writ of Prohibition, then the Petitioner's Only Remedy is a Writ of Mandamus to command the Judges of the Supreme Court of the District of Columbia to dismiss the Suit. Certiorari is desired, if necessary as an Auxiliary Writ.

It is elementary that mandamus is the proper remedy to require a court to assume jurisdiction of a case which properly belongs to it, or to decide a matter which is properly before it.

Hollon Parker, petitioner, 131 U. S. 221.
Chateaugay Iron Co., petitioner, 128 U. S. 544.
Ex parte Parker, 120 U. S. 737.
Ex parte Morgan, 114 U. S. 174.
Ex parte Burtis, 103 U. S. 238.
Ex parte Railway Co., 101 U. S. 711.
Ex parte Flippin, 94 U. S. 348, 350.
In re Hohorst, petitioner, 150 U. S. 653.

Since it is the proper remedy to compel a court to assume jurisdiction, where it possesses it, it is the proper remedy, and should issue to compel a court to dismiss a case where it does not possess jurisdiction, *if the petitioner has no remedy by appeal, writ of error or writ of prohibition.*

In *Virginia* v. *Rives*, 100 U. S. 313, this court issued a mandamus to the judge of a circuit court, requiring him to deliver two negroes to the State jailer. The State prosecutions against them had been removed into the federal court, which had taken jurisdiction of them without authority. The petition for removal showed on its face that the circuit court had no jurisdiction. The court said that mandamus is a remedy when the case is outside of the exercise of the inferior court's discretion and outside of the jurisdiction of the court; that one of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds.

See also *Ex parte Bradley*, 7 Wall. 364, 375, *et seq.*
Ex parte Newman, 14 Wall. 152, 165.
Ex parte Robinson, 19 Wall. 505.
In re Washington & Georgetown Railroad, 140 U. S. 91.
Gaines v. *Rugg*, 148 U. S. 228.
In re Grossmayer, 177 U. S. 48.

Upon this branch of the case we especially rely on *Virginia* v. *Paul*, 148 U. S. 107.

A judge of a United States Circuit Court without authority of law assumed jurisdiction of an indictment for murder found by a grand jury of the State against a revenue officer. There had been no valid removal to the federal court. Yet the Circuit Court tried the accused, and, after a verdict of guilty, set the verdict aside, granted a new trial, con-

timued the case to the next term, and admitted him to bail on his own recognizance.

The Supreme Court held that a writ of mandamus should issue, commanding the judge to cease the exercise of jurisdiction, and remand the prosecution to the State courts, and that no previous motion to the usurping court was necessary.

This court said that a stronger case for issuing a writ of mandamus could hardly be imagined, since a federal court with no jurisdiction was trying the State's right, and the State had no means of reviewing its action.

HERBERT PARKER,

Attorney-General of Massachusetts.

FREDERICK H. NASH,

Assistant Attorney-General of Massachusetts.

[A.]

DEPARTMENT OF JUSTICE, Nov. 17, 1904.

SIR: — Your letter of July 18 last conveyed to me copy of an instrument purporting to be an agreement between the Commonwealth of Massachusetts and John B. Cotton, Esq., of Washington, D. C. The instrument is executed by Mr. Cotton and by Roger Wolcott, Governor, in behalf of the Commonwealth of Massachusetts. This instrument, if valid, is a contract concerning the prosecution and recovery of a claim against the United States for expenses incurred by the State for the support of its troops engaged in the defence of the United States during the civil war. The contract appointed Mr. Cotton the State's "agent and attorney to present, prosecute and recover the claim" before the proper courts and the Treasury Department "at a compensation of 10 per cent. of the entire sum collected, payable only out of any sums that may be collected hereunder." The claim was presented under this contract, ultimately was adjusted, and an appropriation made by Congress for its payment. Subsequently a warrant for the amount of the appropriation, $1,611,740.85, payable to the Governor of Massachusetts, was drawn and delivered to Mr. Cotton.

On May 4, 1904, Mr. Cotton informed Mr. Parker, Attorney-General of Massachusetts, that the warrant had been delivered to him; and on May 6, 1904, Mr. Parker communicated to Mr. Cotton the wish of the Governor that the warrant should be immediately transmitted to him. On May 12, 1904, Mr. Cotton declined to transmit the warrant unless his fees were paid, claiming a lien upon it for the amount of the fees. On May 14, 1904, Mr. Cotton notified you that he claimed "a lien for compensation upon the sum mentioned in said warrant and also upon the warrant itself, in accordance with my contract and the law in relation thereto." It is understood that the delivery of the warrant to Mr. Cotton was unknown to you, but you say that "it has been the custom of the department for many years to make all warrants payable to the

claimants and deliver them to the regularly authorized attorneys for the claimants. In this way the department protects both the claimants and the attorneys." You then ask "whether the practice is authorized, and particularly whether, in the instance of the Commonwealth of Massachusetts, the delivery of the warrant to Mr. John B. Cotton was authorized under the contract. In other words, was the delivery to Mr. Cotton of the warrant, payable to the order of the Governor of the Commonwealth, a good and legal delivery?" In a supplementary letter, under date of Aug. 16, 1904, you state that you desire my opinion as to the validity of the contract between the Commonwealth and Mr. Cotton. Your letter propounds these additional questions: —

"If you hold that the warrant was improperly delivered to Mr. Cotton, can a duplicate warrant be issued without first recovering the warrant now in the hands of Mr. Cotton, or securing an order of court cancelling it? In other words, is there any authority for the issuance of a duplicate warrant when the original is neither lost nor destroyed?

"If, on the contrary, you hold that the delivery of the warrant to Mr. Cotton was authorized by the contract, may the department in its discretion issue a duplicate without first recovering the warrant regularly issued and legally delivered? In other words, can the department voluntarily divest an attorney of his common-law lien upon the property of his client which comes into his possession by reason of his employment?

"Can the government issue a duplicate warrant without becoming liable to the attorney for the amount of his fee?"

And says, in conclusion, that you desire "an opinion covering every legal question necessarily involved."

Assuming for the present that the contract, apart from any statutory prohibition, would be a valid one between the parties, it is clear that by its terms it constitutes Mr. Cotton the agent and attorney of the Commonwealth of Massachusetts, conferring upon him an authority which would authorize him to receive the claim of the State in money or in a warrant or check for money. Such an authority is clearly included within the powers of a duly constituted attorney. It is suggested, however, that the attorney's power is

limited by section 3477 of the Revised Statutes, which provides, that: —

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same."

Without deciding that a contract for the collection of a claim against the United States — which provides that compensation of the attorney shall be "10 per cent. of the entire sum collected, payable only out of any sums that may be collected hereunder" — is a transfer or assignment of any part or share of the claim, certainly this contract, in which it is agreed that Mr. Cotton should present, prosecute and recover the claim as the agent and attorney of the Commonwealth of Massachusetts, is, as Mr. Cotton contends, "a power of attorney, order or other authority for receiving payment." If this be true, it is pronounced by the statute under discussion to be "absolutely null and void," unless authenticated in a manner not followed in this case.

It is suggested that an exception to the rule established by section 3477 was made by the later act of July 27, 1861, under which this claim arises, which directs the Secretary of the Treasury to pay to the Governor of any State "or to his duly authorized agents" the amount of the claim; but in my opinion the act of 1861 ought not to receive such an interpretation. Agents duly authorized are such

as are authorized in conformity with the provisions of existing law. There is no occasion to resort to the theory of a repeal *pro tanto* by implication of section 3477. By a reasonable interpretation the two enactments are consistent with each other. Courts do not favor the repeal of a statute by implication, but give to each act its full effect wherever it is possible to do so without unwarrantable perversion of the language.

Section 3477 has been interpreted by the Supreme Court in several cases. It has been settled that an assignment by operation of law of a claim against the United States is not prohibited by it (*Erwin* v. *United States*, 97 U. S. 392; *Goodman* v. *Niblack*, 102 U. S. 556; *Price* v. *Forrest*, 173 U. S. 410), and that, where the United States makes payment under an unrevoked assignment or power of attorney void under this statute, the United States can not recover back the money thus paid, nor can the claimant recover again money paid to the attorney and retained by him (*McKnight* v. *U. S.*, 98 U. S. 179; *Bailey* v. *U. S.*, 109 U. S. 432; *Freedman's Saving and Trust Co.* v. *Shepherd*, 127 U. S. 494). And in these cases the court declared that the statute was designed solely for the protection of the United States. But your request for opinion does not present any such questions as were determined by the court in the cases cited. The character of the statute is well described by Mr. Justice Strong in *Spofford* v. *Kirk* (97 U. S. 484), who says (p. 488): —

"It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself."

You state in your letter of July 18 that by the delivery of the warrant to the attorney he is protected against clients who are impecunious or who are exempt by law from civil suits, and Mr. Cotton claims to hold the warrant under a lien for his fees. The motive for delivering the warrant to the attorney, and the effect of

such a delivery, if Mr. Cotton's claim be well founded, is to create an interest in the claim, and is in the teeth of the statute as interpreted by Mr. Justice Strong.

I am therefore clearly of the opinion that the practice of delivering warrants to attorneys, except under the safeguards established by section 3477, is not warranted by law. If it be true that the delivery to the attorney of a warrant payable to the claimant confers upon the attorney the right to hold the warrant under a lien for his fees, the transaction does not protect both the claimant and the attorney. It protects the attorney to the extent of a practical assurance of his fee, but it affords no protection whatever to the client, who is unable to obtain the amount of his claim without first paying the fees, which may be in good faith disputed. There can be no more signal illustration of the importance to the government of following exactly the provisions of the statute than is furnished by the facts of the case submitted by you. Among its other purposes, the statute was designed to relieve the government from conflicting claims arising out of the employment of an agent or attorney. As a result of a departure from its strict provisions, a situation has been created, where the Governor of one of the States demands the payment of a warrant for the payment of the sum appropriated by Congress for the State, while Mr. Cotton, with a warrant for the payment in his hands, claims that the Treasury Department shall not comply with the demand of the Governor.

Mr. Cotton claims that his fees, amounting to $161,000, have been fairly earned, and ought to be paid by the State. The State, upon grounds not submitted to me, appears to deny the right of Mr. Cotton. As a result of these conditions, many questions arise which are propounded to me by your letters, to wit: whether the contract between the Commonwealth of Massachusetts and Mr. Cotton is valid; whether a duplicate warrant may be issued to the Commonwealth of Massachusetts without an order of the court cancelling the warrant now in the hands of Mr. Cotton; and whether the Treasury Department can issue a duplicate warrant, in its discretion, and thus voluntarily divest Mr. Cotton of his lien without becoming responsible to him for the amount of his fee. These questions not only relate to the administration of the Treasury

Department, but affect as well the private rights of the contending parties, not submitted to me by them, on which I have and can have no full information or jurisdiction to determine authoritatively as regards the parties. Under ordinary circumstances these considerations would cause this department to hesitate to render an opinion upon the questions submitted by you, other than that of the legality of the practice of issuing warrants where the conditions prescribed by section 3477 have not been complied with. But the conditions have become intolerable to the parties and embarrassing to the Treasury Department.

Mr. Cotton has the warrant, payable to the order of the Governor, in his hands, and declines to deliver it to the payee unless his fees are concurrently assured to him. The State declines to do this, and demands that, without reference to the warrant already issued to Mr. Cotton, the amount of the appropriation should be paid to the Governor. In the mean time, the money lies idle in the Treasury Department, and no prospects of a settlement of the controversy between the parties is in sight. For these reasons, although the answers given touch upon the rights of private persons over which this department has no jurisdiction, it would seem to be proper for me, so far as I can, to answer the other questions propounded, as questions of law arising in the administration of your department.

1. There are no facts submitted to me from which I can form or express any opinion as to the validity of the contract between the Commonwealth of Massachusetts and Mr. Cotton.

2. The written instrument purporting to be a contract between the Commonwealth of Massachusetts and Mr. Cotton is the only authority appearing under which Mr. Cotton may receive payment of the claim or a delivery of a warrant for payment. You may, for the protection of the government, hold this authority "absolutely null and void," recall your action in issuing the warrant delivered to Mr. Cotton, and take measures, by new warrants or otherwise, to see that the appropriation made by Congress for the Commonwealth of Massachusetts is paid to it.

3. In taking such action, in my opinion, the government does not become liable to the attorney for the amount of his fee.

I beg to suggest the desirability of notifying Mr. Cotton a reasonable time in advance of action. If he shall be advised that any proceedings can be initiated by him for the purpose of contesting his rights in the premises, ample opportunity will be afforded him. On the other hand, if he shall prefer to bring an action for the recovery of his fees against the Commonwealth of Massachusetts, it is a satisfaction to know that the State is responsible financially, and has established a tribunal in which those having claims against it may recover them.

I do not wish to be understood as expressing the opinion that Mr. Cotton is not entitled to recover his fee against the Commonwealth of Massachusetts to the extent agreed upon by any contract which that State has lawfully entered into with him.

Respectfully,

W. H. Moody.

The Secretary of the Treasury.

FILE COPY.

FILED
FEB 18 1905
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 15, Original.

EX PARTE: IN THE MATTER OF THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER.

ANSWER OF THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA TO THE RULE TO SHOW CAUSE.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 14963

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 15, Original.

EX PARTE: IN THE MATTER OF THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The answer of the chief justice and associate justices of the supreme court of the District of Columbia to the rule to show cause issued against them in the above-entitled matter on January 3, 1905, respectfully shows:

1. These respondents admit that John B. Cotton, claiming to be a citizen of the United States and a resident of the District of Columbia, on November 18, 1904, filed a bill in equity in the supreme court of the District of Columbia (being cause No. 25032 in said court) against "Leslie M. Shaw, Secretary of the Treasury, and John L. Bates, governor of the Commonwealth of Massachusetts." A true copy of said bill of complaint is set forth in the petition filed herein by the Commonwealth of Massachusetts as "Exhibit B."

Upon the filing of said bill Mr. Justice Gould, one of the associate justices of this court, granted a rule directed to the defendant Leslie M. Shaw, Secretary of the Treasury, *alone*,

requiring him to show cause on or before the 22d day of November, 1904, why an injunction should not be issued against him, his assistants, subordinates, and clerks, in accordance with the prayer of said bill. This rule directed that a copy of said rule and of the bill of complaint be served upon said Leslie M. Shaw forthwith. On the same day said rule and bill were regularly served upon said Leslie M. Shaw. A copy of said rule is hereto attached, marked "Exhibit "A," and it is prayed that it may be read as a part of this answer.

2. Upon the day said rule was made returnable counsel for said Leslie M. Shaw and for the complainant Cotton announced to Mr. Justice Anderson, one of the associate justices of this court, that it had been agreed between them that, owing to the illness of one of the leading counsel for Mr. Cotton, the hearing on said rule might be postponed to a day to be thereafter agreed upon, reserving all the rights of the parties in the matter. The hearing was accordingly postponed, and, owing to the continued illness of said counsel and to the issuance of the rule to this court, said cause has not yet come on for hearing.

No answer to said rule has been filed by said Leslie M. Shaw, and no other proceedings have been taken in the cause. The complainant Cotton did not request any process or rule to issue against the defendant Bates, and no such process has in fact been issued by this court. All of which will more fully appear by reference to a copy of the docket entries in this cause, marked "Exhibit B" and made a part of this answer.

3. These respondents have no independent knowledge of this litigation or of the questions of fact and law that will or may arise therein other than what they have learned from the allegations of the bill filed by the complainant.

From an examination of said bill, however, they submit, with all deference, that the suit is not nominally against the State of Massachusetts, nor does the complainant seek affirmative relief against the property of that State; but it appears to be an action in the nature of a proceeding *in rem* to establish an attorney's lien under a contract with said State, and also by reason of such professional relation upon a warrant for $1,611,740.85, payable to the order of the governor of Massachusetts, and delivered in due course of business by said Shaw, as Secretary of the Treasury, to the complainant Cotton, as the attorney and agent of said State. Said suit also appears to be an action in the nature of a proceeding *in personam* primarily against the defendant Leslie M. Shaw, as Secretary of the Treasury, to prevent him from defeating or destroying such lien and rights acquired under said contract by issuing to and at the request of the defendant Bates a duplicate warrant, and to prevent said Bates from demanding and receiving such duplicate.

It is therefore respectfully submitted that the suit is a matter of which this court has and ought to take jurisdiction, the complainant alleging that he is a citizen and resident of this District, the warrant upon which the lien is claimed and the principal defendant Shaw all being within this District and subject to the jurisdiction of this court.

4. These respondents further say that no appearance has been entered by the State of Massachusetts in this suit, no process has been prayed or issued against it, and, so far as the respondents are advised, said State has no interest in the controversy and cannot be affected by the result of this litigation. These respondents suggest that until said State appears and asserts any interest which it may have and its immunity from suit in this jurisdiction the extraordinary relief prayed for by said State should not be granted to pre-

vent this court from exercising a jurisdiction over property within its custody and parties subject to its control.

HARRY M. CLABAUGH,
Chief Justice.
JOB BARNARD,
Asso. Justice.
THOS. H. ANDERSON,
Asso. Justice.
ASHLEY M. GOULD,
Asso. Justice.
DAN. THEW WRIGHT,
Asso. Justice.
WENDELL P. STAFFORD,
Asso. Justice.

Test:

JOHN R. YOUNG, *Clerk,*
By W. E. WILLIAMS, *Ass't Clerk.*

[Seal of the Supreme Court of the District of Columbia.]

EXHIBIT "A."

Rule to Show Cause.

Filed November 18, 1904. J. R. Young, Clerk.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

JOHN B. COTTON, *Complainant*, *vs.* LESLIE M. SHAW, *Secretary of the Treasury*, and JOHN L. BATES, *Governor of the Commonwealth of Massachusetts.*	In Equity. No. 25032.

This cause coming on to be heard upon the bill of complaint filed herein, it is this 18th day of November, 1904, ordered that the defendant, Leslie M. Shaw, Secretary of the Treasury, show cause, if any he have, on or before the 22nd day of November, 1904, why an injunction should not be issued restraining and enjoining him, his assistants, subordinates and clerks from cancelling or attempting to cancel upon the books of the Treasury Department or otherwise the Treasury warrant heretofore issued in favor of the governor of the State of Massachusetts and now in the possession of the complainant, John B. Cotton, the same being War Settlement Warrant No. 11,343, dated May 2, 1904, and drawn on the Treasurer of the United States in favor of the governor of the State of Massachusetts, for the sum of one million, six hundred and eleven thousand, seven hundred forty 85/100 dollars ($1,611,740.85), and from drawing, making, signing or issuing to the defendant John L. Bates, governor of the Commonwealth of Massachusetts, or any other person a second or duplicate warrant in settlement or satisfaction of the claim of the State of Massachusetts in the

said bill of complaint set forth or in lieu or place of the said described warrant now outstanding and in possession of said complainant. It is further ordered that a copy of this order and of the bill of complaint be served upon the said Leslie M. Shaw forthwith.

ASHLEY M. GOULD, *Justice.*

Marshal's Return.

Served copy of the within rule to show cause on Leslie M. Shaw, Secretary of the Treasury, personally.

Nov. 18, 1904.

AULICK PALMER, *Marshal.*

[Seal of the Supreme Court of the District of Columbia.]

A true copy.

Test:

J. R. YOUNG, *Clerk,*

By J. W. LATIMER, *Ass't Clerk.*

EXHIBIT "B."

SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 25032.

PARTIES.	ACTION.	COMPLAINANT'S SOLICITOR.	COSTS.	
Cotton, John B., *vs.* 1, Shaw, Leslie M., Sec'y Treasury; 2, Bates, John L., Gov. of Mass.	Injunction..	Wm. F. White. Defendants' solicitor : ——— ———.	Clerk ..... Marsl.al ..... Examiner ..... Depositions(—) Auditor.. ..... Printer..... .. Witnesses... .. Solicitor.....	

DATE.	PROCEEDINGS.	CLERK'S FEES.	
1904, Nov. 18	Deposit toward costs by W. F. White	$10.00	
" " "	Bill appearance order to file & exhibits (10)... ...	.....	$3.05
" " "	Spa. to ans. & copy to def't No. 1 only.	.....	2.00
" " "	Certificate to copy bill.....	.. ..	.50
" " "	Injunction, rule as to, ret'ble Nov. 22, 1904. M. 72, p. 120....	.....	.70
" " "	& copy " " " iss'd.....	.....	2.00
" " "	By " " " ret'd served copy on def't No. 1.....	.....	.25
" " 30	Copy of bill issued to gov. of Mass. by Mr. Nash.	.. ....	10.80
" " "	Additional deposit for costs by Mr. Nash, att'y gen. Mass.....	10.80	
" Dec. 6	Spa. to ans. ret'd sum'd No. 1, not to be found No. 2.....	.....	.25

[Seal of the Supreme Court of the District of Columbia.]

A true copy.
Test :

J. R. YOUNG, *Clerk*,
By J. W. LATIMER,
Ass't Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. ....., Original.

IN RE COMMONWEALTH OF MASSACHUSETTS, PETITIONER.

Motion for Leave to File Petition for Writ of Prohibition, etc.

We have considered the brief of Attorney General Parker, filed in support of the *ex parte* motion.

From paragraph 5, found on page 28, it is evident that Attorney General Parker is not satisfied with the brief which he has filed, for he suggests that this motion ought "not to be determined against Massachusetts upon this summary brief, but may be fully and adequately argued" on the petition, should leave to file it be granted by the court. We are not in a position to accept or controvert the statement of the brief that "the principle upon which our petition rests we believe to be one of the most important to the dignity of Massachusetts that our Commonwealth has ever asserted before any tribunal."

Whether this be so or not, we are quite certain that the "dignity of Massachusetts" is no more an object of solicitude

to this court than the legal rights, honor, and professional standing of our client in the premises.

We are fully aware that whether or not this motion shall be granted rests largely in the discretion of the court, which would hesitate to debar the Attorney General, by summarily denying the motion, from an opportunity of fully presenting the reasons why the petition should be granted. We are equally of the belief that the suggestions as to the lack of jurisdiction of the supreme court of the District are unsound, and upon argument will be found to be wholly untenable. Both in the petition and in the brief will be found many *ex parte* statements entirely at variance with the facts, and which we trust we shall be able, if opportunity is afforded us, to show the court are not true.

By not entering into an argument upon the motion or a discussion of Attorney General Parker's brief, we do not wish to be understood that we assent to his position either as to the law or the facts. On the contrary, we emphatically deny both his law and his facts. Neither do we wish to suggest any conclusion to which the court ought to come upon the proceeding as it now stands. If the court should be of the opinion that the State should be granted leave to file its petition, we simply desire to be given leave to present to the court, on the hearing of the petition, our reasons for objecting to the issuing of the writ.

Respectfully submitted.

FREDERIC D. MCKENNEY,
WM. FRYE WHITE,
J. S. FLANNERY,
Attorneys for John B. Cotton.

FILE COPY.

FILED
FEB 18 1905
JAMES H. MCKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 15, Original.

EX PARTE: IN RE THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER.

BRIEF FOR JOHN B. COTTON IN OPPOSITION TO THE PETITION FOR WRITS OF PROHIBITION, MANDAMUS, AND CERTIORARI.

FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,
WILLIAM HITZ,
WILLIAM FRYE WHITE,
Attorneys for ~~John B. Cotton~~ Respondents

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 14633

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 15, Original.

EX PARTE: IN RE THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER.

Brief for John B. Cotton in Opposition to the Petition for Writs of Prohibition, Mandamus, and Certiorari.

STATEMENT OF FACTS.

This is an application by the Commonwealth of Massachusetts for a writ of prohibition and the correlative writs of mandamus and certiorari to the justices of the supreme court of the District of Columbia to restrain them from taking further proceedings or entertaining jurisdiction in a certain equity suit pending in said court wherein John B. Cotton is complainant and Leslie M. Shaw, Secretary of the Treasury, and John L. Bates, then governor of the Commonwealth of Massachusetts, are defendants.

The suit below grows out of a controversy which has arisen from the employment of said Cotton by the State of Massachusetts to prosecute and recover a claim which it had against the United States for expenses incurred in arming and equipping troops employed in the War of the Rebellion,

By an act of the Congress of the United States approved July 27, 1861 (12 Stats. L., 276), it was provided:

> "That the Secretary of the Treasury be, and he is hereby, directed, out of any money in the Treasury not otherwise appropriated, *to pay to the governor of any State, or to his duly authorized agent*, the cost, charges and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers, to be filed and passed upon by the proper accounting officers of the Treasury."

On March 20, 1888, the legislature of Massachusetts passed the following resolution authorizing the employment of an agent to represent the Commonwealth in the prosecution of its war claim against the United States:

> "*Resolved*, That the governor and council are hereby authorized to employ the agent of the Commonwealth for the prosecution of war claims against the United States, to prosecute also the claim of the Commonwealth for a refund of the direct tax paid under act of Congress approved August fifth, in the year eighteen hundred and sixty-one, and of the interest paid upon war loans during the period from eighteen hundred and sixty-one to eighteen hundred and sixty-five, *also to fix his compensation which shall be paid out of any amount received therefrom.*"
>
> Massachusetts Acts and Resolves, 1888, Resolve 39, p. 540.

Subsequently to the passage of this act of 1888, negotiations were opened with Mr. Cotton by the Commonwealth of

Massachusetts, through its then attorney general, Hon. Hosea M. Knowlton, with a view to employing him to conduct the prosecution of its war claims.

On July 12, 1899, the legislative council of the Commonwealth passed a resolution authorizing the attorney general to employ said Cotton to prosecute said claims, "the compensation for such employment not to exceed 10 per cent. of the amount collected" (Petition, 14–15).

Pursuant to this authority Hosea M. Knowlton, then attorney general, prepared a form of contract between the Commonwealth and said Cotton, and on July 15, 1899, transmitted duplicate originals thereof to Mr. Cotton for execution by him, and four days later forwarded the contract, as executed by Mr. Cotton, to Hon. Roger Wolcott, then governor of Massachusetts, for execution by him in behalf of the Commonwealth (Petition, 16–17).

The contract is set out in full in the bill filed in the court below and will be found in the petition, pp. 18–19.

Said contract bears date on the 18th of July, 1899, and the only portions thereof which are material in the consideration of this petition are the following:

> "Now, therefore, said Roger Wolcott, governor of the Commonwealth of Massachusetts, for and in consideration that said John B. Cotton has agreed to present, prosecute and endeavor to recover before the Court of Claims, the Supreme Court of the United States, and the Treasury Department of the United States, said claim of the Commonwealth of Massachusetts, has appointed and does hereby appoint said John B. Cotton *its agent and attorney* to present, prosecute and *recover* the claims as aforesaid on the terms and conditions hereinafter specified.

> "Said John B. Cotton agrees to prepare, present, prosecute and *endeavor to recover* before said Court of Claims, the Supreme Court of the United States, and the Treasury Department of the United States the claim aforesaid on behalf of said Commonwealth of Massachusetts at a compensation of 10 per centum *of the entire sum collected, payable* ONLY *out of any sums that may be collected hereunder*, and without any liability on behalf of said Commonwealth of Massachusetts for expenses incurred by said Cotton in the prosecution of said claim, etc."

Upon receipt of a duplicate original of said contract duly executed by the Commonwealth of Massachusetts, said Cotton deposited it with the Secretary of the Treasury of the United States as evidence of his right and authority to appear before that Department in the prosecution of said claim, and to recover the amount found to be due to the Commonwealth on account thereof.

Mr. Cotton at once entered upon the prosecution of the claim and devoted to it five years of continuous and arduous labor and attention until the claim was finally adjudicated, audited, and passed.

On or about May 2, 1904, the Treasury Department issued and delivered to him, as the duly authorized agent of the Commonwealth of Massachusetts, war settlement warrant, No. 11343, payable "to the governor of the State of Massachusetts, or order," for the sum of $1,611,740.85, and addressed "P. O. address, c/o John B. Cotton, *agent and att'y*, Washington, D. C." (Petition, 20).

At no time between the date of the execution of the contract and the date of the appropriation by Congress to pay

the claim was any dissatisfaction expressed with the provisions of said contract or with the manner in which Mr. Cotton had performed his services thereunder. It was only after Mr. Cotton's efforts had resulted in the adjudication of the claim and an appropriation by Congress for the claimant that former Governor Bates and the present attorney general of Massachusetts suddenly awoke to the fact that the amount of the compensation which he was entitled to receive under his contract with the Commonwealth was large.

No attempt was made by the Commonwealth to repudiate the contract which it had made or to cancel the power of attorney contained therein, and on May 2, 1904, when the warrant was actually delivered to Mr. Cotton as the agent of the Commonwealth, the contract containing the power of attorney was on file in the Treasury Department, unrevoked and uncanceled.

On May 6, 1904, Mr. Cotton notified Attorney General Parker that the warrant in question had been delivered to him, and received an acknowledgment of said notification from the attorney general, reading, "I have advised His Excellency, the Governor, of the receipt of your communication, and am requested by him to say to you that he awaits the immediate transmission of the warrant to him." On the 12th of May following Mr. Cotton replied to the attorney general, pointing out to him that he was entitled to a lien upon the warrant for the amount of his fees under his contract, and also mailed a copy of said letter to ex-Governor Bates (Petition, 22–28).

On the 14th of May he notified the Secretary of the Treasury that he claimed a lien for compensation upon the war-

rant in accordance with his contract with the Commonwealth (Petition, 32).

Having received a very evasive acknowledgment from the attorney general in reference to the position which the Commonwealth intended to assume in regard to its contract with him, Mr. Cotton on the 28th of May, 1904, addressed a further communication to the governor in which he said:

> "That there may be no possible misunderstanding of my position in this matter, I desire to say, what I think I have already said in substance, that I am now and always have been ready to deliver to Your Excellency the warrant now in my possession at any time when the Commonwealth is ready to pay me the fees to which justly and legally I believe I am entitled. And I desire further to say that if Your Excellency will appoint any reasonable time at which I may both deliver the warrant to you and receive my compensation of 10 per cent. thereof, I shall be glad to do so" (Petition, 33).

The receipt of this letter was acknowledged by the attorney general in a communication as evasive and noncommittal as his letter of May 16. This letter is couched in the most ambiguous language, and, while calling upon Mr. Cotton to perform his contract to the letter, it carefully refrains from even suggesting that the State intends to be bound by it in any particular.

Without making the slightest acknowledgment of Mr. Cotton's letter of May 28, containing a tender of the warrant and demand for his fees under his contract (except the indirect response of the attorney general just referred to), former Governor Bates, with an astuteness that might warm

the cockles of the heart of a modern politician, but which would hardly commend him to the favorable consideration of a court of equity, without notifying Mr. Cotton, addressed a communication to the Secretary of the Treasury under date of June 24, 1904, in which he demanded that payment upon the warrant already drawn be stopped, that the warrant itself be canceled, and that a duplicate thereof be forwarded to him as governor of the Commonwealth (Petition, 9).

The letter of the governor to the Secretary of the Treasury was equally as open and candid as his communication to Mr. Cotton. Instead of coming out frankly and saying that the State did not consider that it was bound by its contract with Mr. Cotton, or that the latter had no authority to receive and the Secretary of the Treasury no power to issue the warrant to Mr. Cotton, he casts suspicion upon the conduct of Mr. Cotton and upon the validity of the action of the Department by saying, "I am further advised that such warrant was delivered by the Treasury Department of the United States to John B. Cotton, Esquire, of Washington, *representing himself to be the agent and attorney of this Commonwealth.*"

This demand of Governor Bates met with the terse, pointed, and vigorous rejoinder from the Secretary which it merited (Petition, 9–10). The Secretary's letter concludes as follows:

> "The situation then appears to be as follows: The agent of the Commonwealth of Massachusetts holds in his possession a warrant payable only on the governor's endorsement, which he now refuses to surrender. Being authorized to recover, the delivery of the warrant to the regularly constituted agent of the

> Commonwealth appears to be regular and fully authorized. Being thus regular and authorized, and the warrant unlost, as I am now advised, I see no excuse or justification for issuing a duplicate. If I am in error in my analysis I shall be very glad to hear from you."

Upon the 15th of July following, ex-Governor Bates asked that the matter of his request for the issuance of a duplicate warrant be referred to the Attorney General for his opinion. This was done, and the Attorney General some time in the latter part of November, 1904, gave the Secretary of the Treasury an opinion in writing, which opinion is not set out in the record.

Thereupon Mr. Cotton filed a bill in the supreme court of the District of Columbia against "Leslie M. Shaw, Secretary of the Treasury, and John L. Bates, governor of the Commonwealth of Massachusetts," in which he asserted his right to an attorney's lien upon the papers of his client, the Commonwealth of Massachusetts, including the warrant in question, and prayed, among other things, that said Leslie M. Shaw might be restrained and enjoined from canceling the warrant which had been delivered to him, and from drawing or issuing a duplicate thereof to said Bates, and "that the defendant, John L. Bates, may be restrained and enjoined from asking, demanding or receiving from the defendant, Leslie M. Shaw, or any of his assistants, subordinates or clerks, a second or duplicate warrant as aforesaid."

The State of Massachusetts was not named as a party to this suit, and no relief was prayed against the State.

Upon the filing of this bill, the Honorable Ashley M. Gould, one of the justices of the supreme court of the Dis-

trict of Columbia, issued a rule directed to the defendant, Leslie M. Shaw, Secretary of the Treasury, *alone*, requiring him to show cause on or before the 22d day of November, 1904, why the relief prayed as against him should not be granted. This rule was regularly served, and a true copy thereof is attached to the answer of the chief justice and associate justices of the supreme court of the District of Columbia as Exhibit "A."

The cause, owing to the illness of the leading counsel for Mr. Cotton, and by agreement with counsel for the Government, has not yet come on for hearing in the court below.

It will be seen from the copy of the docket entries (Answer to Rule, Exhibit B) that no service of process upon said Bates has been attempted, nor has any pleading been filed by him or by the State of Massachusetts in the cause.

POINTS AND AUTHORITIES.

While the petition of the Commonwealth of Massachusetts prays that writs of prohibition, mandamus, and certiorari may be issued to the judges of the supreme court of the District of Columbia, a consideration of the right of the Commonwealth to the writ of prohibition will necessarily dispose of its right to the other extraordinary writs mentioned.

We submit that the application of the Commonwealth for the writ of prohibition must be denied for the following reasons:

1. This court has no power to issue a writ of prohibition to the judges of the supreme court of the District of Columbia.

2. The application for the writ has been prematurely made, the petitioner not having appeared in the court below and filed a plea to the jurisdiction.

3. The petitioner has failed to show that if the writ of prohibition should not be granted it would result in an injury for which no other adequate remedy exists.

4. The State of Massachusetts is neither an actual party to the suit nor a necessary party thereto. The proceeding below is in the nature of an action *in rem* to establish an attorney's lien upon a valuable paper—the warrant—which in due course of employment was regularly delivered to Mr. Cotton as the agent and attorney of the Commonwealth duly authorized to receive it.

5. The State has not been made a party by the joinder as a defendant of Bates, its former governor. Mr. Bates was joined to prevent him as an individual from attempting to commit an act, or from procuring the commitment of an act, which would have destroyed a vested right acquired by Mr. Cotton under a contract with the State, and which entitled him to retain possession of said warrant as security for the payment of his fee.

6. If the joinder of former Governor Bates can be regarded as making the State a party defendant, then the suit has abated in respect of the State by the expiration of Mr. Bates' term as governor, and the suit cannot be revived against his successor in office.

7. The State has not been made a party by the joinder of the defendant Shaw as Secretary of the Treasury. Secretary

Shaw was made a defendant in his individual capacity to prevent him from attempting to do, at the request of former Governor Bates, an unlawful ministerial act, namely, the issuing and delivering to said Bates of a new warrant, which would have destroyed Mr. Cotton's lien upon the warrant which had already been lawfully and regularly issued and delivered to him as the agent and attorney of the Commonwealth.

8. If it should be considered that the effort to establish a lien upon the warrant, and to enjoin the threatened action of the Secretary of the Treasury in issuing a new warrant, makes the proceeding in effect a suit against the State of Massachusetts, then we submit that the cause falls within a well-established exception to the general rule prohibiting actions by an individual against a sovereign State, which exception provides that where property belonging to a sovereign comes within the control of a court without its compulsory process, either by the voluntary act of the sovereign or by the voluntary act of an individual having lawful possession of said property and asserting a right therein as against the sovereign, such court has jurisdiction to determine the rights of the parties in respect to such property.

I.

THE POWER OF THIS COURT TO ISSUE THE WRIT.

The only questions before this court upon this petition for a writ of prohibition are (1) the power of this court to issue the writ of prohibition and (2) the jurisdiction of the supreme

court of the District of Columbia over the cause. There can be no investigation or inquiry touching the merits of the action.

> High on Extraordinary Legal Remedies, 3d ed., sec. 767*b*.

a. This court derives its statutory power to issue the writ of prohibition from section 688 of the Revised Statutes of the United States, which authorizes the issuance of the writ to the district courts of the United States when proceeding as courts of admiralty and maritime jurisdiction, and from section 716 of the Revised Statutes of the United States (brought forward from sec. 14 of the Judiciary Act of 1789), which provides:

> "The supreme court and the circuit and district courts shall have power to issue writs of *scire facias*, and they shall also have the power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

Under this section this court has held that it possesses the power to issue the writ of certiorari whenever the circumstances imperatively demand that form of interposition to correct excesses of jurisdiction and in furtherance of justice.

But this court has never so decided in reference to the writ of prohibition. On the contrary, in *Ex parte Gordon* (1 Black, 503, 506) Mr. Chief Justice Taney, in delivering the opinion of the court, said:

> "A prohibition cannot issue from this court in cases where there is no appellate power given by law, nor any special authority to issue the writ."

The same conclusion was reached in *Ex parte Christy* (3 Howard, 292), where a motion was made for a writ of prohibition to the district court of the United States for the district of Louisiana, to prohibit it from further proceeding in a bankruptcy case pending before it.

b. Since the passage of the act of February 9, 1893 (27 Stats., 434), establishing the Court of Appeals of the District of Columbia, this court—except, perhaps, in cases arising under the present bankruptcy law—cannot review the judgments and decrees of the supreme court of the District of Columbia until after they shall have been passed upon by said Court of Appeals. There is no right reserved to this court by statute to review the judgments or decrees of that court upon direct appeal or writ of error.

If the supreme court of the District of Columbia has jurisdiction of the cause, then the writ of prohibition cannot issue to that court, because such writ only issues to prevent an inferior court from attempting to exercise jurisdiction which it does not possess, or to prevent the excessive exercise of jurisdiction which it does possess.

If the supreme court of the District of Columbia has no jurisdiction over the cause, or if it has jurisdiction, but this court has not direct appellate jurisdiction to review its judgments or decrees, then before the writ of prohibition can issue this court must hold that it has *original* jurisdiction of the controversy.

Under article 3, section 2 of the Constitution this court is given original jurisdiction of all those cases in which a State shall be a party, which are enumerated in the first clause of

section 2, namely, in controversies between two or more States; between a State and the citizens of another State; between citizens of different States; between citizens of one State claiming lands under grants of different States, and between a State or citizens thereof and foreign States, citizens, or subjects.

By the 11th amendment to the Constitution the judicial power of this court over controversies in which a State is a party was modified so that it should not extend to "any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State."

Neither the provision of the Constitution conferring jurisdiction of controversies over States, nor the prohibition of the 11th amendment restricting that jurisdiction, can apply to the case at bar, because this is not a controversy between a State and a citizen of another State. The bill shows Mr. Cotton to be a citizen and resident of the District of Columbia, and this court has held that while the District of Columbia is a distinct political society or community, and therefore a State according to the definition of writers on general law, and should be so regarded for the purpose of construing and applying treaty stipulations (Geofroy *v.* Riggs, 133 U. S., 258, 269), yet it is not a State within the meaning of the constitutional provision just referred to, and that consequently a citizen of the District of Columbia cannot sue in the circuit court of the United States as a citizen of a State.

Hepburn *v.* Ellzey, 2 Cranch 445, 452 (op. by Ch. J. Marshall).

Metropolitan R. R. *v.* District of Columbia, 132 U. S. 1, 9.

In the case of *Hooe v. Jamieson* (166 U. S., 395), which was an action in ejectment brought in the circuit court of the United States for the western district of Wisconsin, by the complaint in which the plaintiffs in error alleged that they resided in and were citizens of the city of Washington, D. C., and that the defendants all resided in and were citizens of the State of Wisconsin, this court said:

> "We see no reason for arriving at any other conclusion than that announced by Chief Justice Marshall in *Hepburn v. Ellzey*, 2 Cranch, 445, February term, 1805, 'that the members of the American confederacy only are the States contemplated in the Constitution;' that the District of Columbia is not a State within the meaning of that instrument; and that the courts of the United States have no jurisdiction of cases between citizens of the District of Columbia and citizens of a State."

If the Court possesses no original jurisdiction over this controversy, it would seem to have no power to issue the writs of prohibition, certiorari, or mandamus prayed for by the petitioner, because under section 716 of the Revised Statutes the issuance of such writs is confined to those cases of which this court has either appellate or original jurisdiction. The provisions of section 716, being a re-enactment of section 14 of the Judiciary Act of 1789, were expressly referred to and reviewed in the opinions of Mr. Chief Justice Taney in *Ex parte Gordon* and of Mr. Justice Story in *Ex parte Christy, supra*, where the conclusion was reached that this court has no power to issue a writ of prohibition except in the cases expressly provided for by statute and in

those cases where it possesses the right of review upon appeal.

In his dissenting opinion in the Christy case Mr. Justice Catron said:

> "By the 14th section of the Judiciary Act this court has power to issue writs proper and necessary for the exercise of its jurisdiction; having no jurisdiction in any given case, it can issue no writ."

c. In this case the application has been prematurely made, the petitioner not having appeared in the court below and filed a plea to the jurisdiction.

> "Being an extraordinary writ, however, it (the writ of prohibition) issues only in cases of extreme necessity, and before it will be granted it must appear that the party aggrieved has applied in vain to the inferior tribunal for relief."
>
> High, Extraordinary Legal Remedies, sec. 765.
>
> Smith *v.* Whitney, 116 U. S., 167, 174.
>
> *Re* Huguley Mfg. Co., 184 U. S., 297.

It was remarked by Mr. Justice Gray in *Smith v. Whitney* (116 U. S., 173):

> "Where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court whose action is sought to be prohibited is doubtful or depends upon facts which are not made matters of record, or where a stranger, as he may in England, applies for the writ of prohibition, it may be said to be discretionary. But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, *and the defendant has objected to its*

jurisdiction at the outset and *has no other remedy*, he is entitled to a writ of prohibition as a matter of right; and a refusal to grant it where all the proceedings appear of record may be reviewed in error."

d. The petitioner has failed to show that if the writ should not be granted it will result in an injury for which no other remedy exists.

> "Like all other extraordinary remedies, prohibition is granted only in cases where the usual and ordinary forms of remedy are insufficient to afford redress. And it is a principle of universal application and one which lies at the very foundation of the law of prohibition that the jurisdiction is strictly confined to cases where no other remedy exists, and it is always a sufficient reason for withholding the writ that the party aggrieved has another and complete remedy at law."
>
> High, *id.*, sec., 707.
> Smith *v.* Whitney, *supra.*
> *Re* Huguley Mfg. Co., *supra.*

The suit instituted by Mr. Cotton not being against the State of Massachusetts *eo nomini*, until that State appears in the court below and interposes a plea to the jurisdiction this court can not assume, upon the petition which has been filed here, that the proceeding below will result adversely to the interests of that State, or that it will injuriously affect her interests.

Nor can the State of Massachusetts successfully contend that it is remediless. It would be entirely in keeping with the dignity of that State if she would voluntarily waive all

technicalities and enter an appearance in the court below, which court has already acquired jurisdiction of the *res* and of two of the parties. In this proceeding, by filing a cross-bill, the State might, if it so desired, have a judicial construction of the contract which is the basis of this litigation and of the rights of the respective parties thereunder, and if the decision of the chancellor should be adverse to its claims, appeal to the Court of Appeals of the District of Columbia and finally to this court.

> "In all cases, therefore, where the party aggrieved may have ample remedy by an appeal from an order or judgment of the inferier court, prohibition will not lie, no such pressing necessity appearing in such case as to warrant the interposition of this extraordinary remedy, and the writ not being one of absolute right but resting largely in the sound discretion of the court."
>
> High, *id.*, sec. 771.

e. And, lastly, the writ must be denied, because the supreme court of the District of Columbia has jurisdiction of the cause.

II.

THE JURISDICTION OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

The fund of $1,611,740.85; the symbol representing that fund—the warrant; the principal defendant, the Secretary of the Treasury, and the complainant, John B. Cotton, are all within the jurisdiction of that court. The suit is in the nature of a proceeding *in rem* to establish an attorney's lien

for fees upon the warrant—a valuable paper of his client, which is in Mr. Cotton's possession; while it is also in the nature of a proceeding *in personam* directed against the defendant Shaw, as Secretary of the Treasury, and the defendant Bates, as governor of the State of Massachusetts, to have the former restrained from canceling the existing warrant and issuing a duplicate warrant in compliance with the request of said Bates, thus destroying the value of complainant's lien, and to have the latter enjoined from demanding or receiving such duplicate.

The contract in controversy is admitted to have been made with Mr. Cotton, and, so far as this proceeding is concerned, it must be conceded to be valid and binding upon the Commonwealth of Massachusetts. It must also be conceded that Mr. Cotton completed the services required of him under that contract by prosecuting the claim of the State against the United States to a successful issue. In the course of such service, and under the express authority contained in the contract, a valuable paper, *the Treasury warrant*, was regularly delivered to him by the Secretary of the Treasury.

Upon the delivery to Mr. Cotton of this paper it became impressed with a lien arising (1) from the contract of employment and (2) from *quantum meruit—i. e.*, for the value of the service rendered, irrespective of contract.

In re Paschal, 10 Wallace, 483.
McPherson *v.* Cox, 96 U. S., 404.
Wylie *v.* Coxe, 15 How., 415.

In McPherson *v.* Cox a contract had been made to pay to an attorney, for his services in suits concerning certain land, a specific sum of money out of the proceeds recovered. The

land having been recovered and sold by the owner for $38,000, a bond was taken and left with the attorney. A controversy having arisen between the client and the attorney as to the amount of the fee and the validity of the contract for services, this court, in an opinion by Mr. Justice Miller, held that the attorney was entitled to a lien on the bond for the money due him for his services under the contract, and also by reason of the relation of attorney. Upon this point the court says:

> " We are also of opinion that this obligation on the part of complainant to pay $5,000 to Carlisle and McPherson was, and is now, a lien on the bond in McPherson's possession. It is so by the express contract of the parties, as admitted by Mrs. Cox. It was to be paid out of the proceeds of the sale of the land recovered by the suit in equity in which they were employed. The first sale of the land was in a lump, and this bond for $38,000 represents the proceeds of that sale. It is the only proceeds of the sale. It is also a very fair inference, from the fact that the bond was left in McPherson's possession, that it was done as a recognition of the lien. There is no other reason why it should have been left with him. It was no part of his right or his duty as trustee to hold it. Its possession was in no way essential to any of the very few acts which, as trustee, McPherson could be called on to do under the deed of trust. It is, therefore, manifest that it was left with him as her attorney, or as a security for his debt. *It is none the less clear to us, that, apart from the express agreement for a lien, the same result follows from his relation to her as attorney, and the possession of this bond as a paper coming to him in the course of his employment in that character.* We have decided in the case of Paschal (10 Wall., 483), that an attorney has a

lien by law, under circumstances similar to these, for all that is due him as attorney or counsellor, on the papers of his client in his hands.

* * * * * * *

"We are, therefore, of opinion that McPherson has a right to the possession of the bond until the fee of $5,000 is paid, and that he has done nothing inconsistent with his duty as trustee under the deed of trust, nor displayed any hostile feeling to the real legal rights or interest of complainant, nor failed or neglected to perform any duty devolving on him as such trustee."

The lien claimed by Mr. Cotton grows out of his possession of the warrant and is inseparably connected with it. It constitutes a valuable right of property which would disappear should he surrender the possession of the warrant to the Commonwealth. It was only when this vested right in the subject-matter of the controversy was imperiled by Bates, the then governor of Massachusetts, demanding of the Secretary of the Treasury that he issue to him a second warrant and cancel the first, that Mr. Cotton was driven into court to protect his interests. The case therefore seems to come clearly within the principles established in the leading cases in this court of *Hans v. Louisiana* and *Pennoyer v. McConnaughy, post.*

The State is Not an Actual or Necessary Party.

The State of Massachusetts is not an indispensable party to the action sought to be stayed by the writ of prohibition, because the right asserted by the bill of complaint therein can be fully protected, and the situation sought to be reached

by aid thereof can be fully attained, even if the bill is dismissed as against the governor of Massachusetts and retained for adjudication as against the other defendant alone.

The right asserted by the bill of complaint is essentially a defensive right—the mere right of continuing an existing possession of *personal property*, and thereby preserving a lien thereon which has arisen both under a special contract and under the general right of an attorney or agent to a *quantum meruit* for services rendered and accepted.

The complainant merely seeks to maintain the *statu quo* in respect of a particular piece of personal property belonging to the State of Massachusetts, which, in the regular course of business, has come into his possession by virtue of a contract with the State and of services performed for the State, and which property the complainant offers to bring into court to abide the action of the court thereupon.

The complainant does not ask for any affirmative relief against the State of Massachusetts, nor for the specific performance of the State's contract with him, but only that an officer of the State may be enjoined from doing certain threatened acts which, if done, would invade his vested property rights, already acquired and possessed by virtue of his contract with the State.

The complainant recognizes the rule laid down by this court in *Hans v. Louisiana* (134 U. S., 1) and in *Pennoyer v. McConnaughy* (140 U. S., 1) as stating the present law regulating suits against States and the officers of States, and that in determining whether a particular suit is or is not in essence against a State the court will look behind the nominal parties to the record and into the merits of the controversy and the character of the relief sought.

In *Hans v. Louisiana* Mr. Justice Bradley, in delivering the opinion of the court, said:

> "To avoid misapprehension it may be proper to add that, although the obligations of the State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued or comes itself into court; yet where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, *may be judicially resisted*; and any law impairing the obligations of contracts under which such property or rights are held is void and powerless to affect their enjoyment."

The principle announced in Hans *v.* Louisiana has been so frequently reaffirmed by this court that it seems unnecessary to do more than refer to the cases in which the question has been raised.

Tyler case, 149 U. S., 191.

Reagan *v.* Farmers' Loan & Trust Co., 154 U. S., 388.

Belknap *v.* Schield, 161 U. S., 17.

Scott *v.* Donald, 165 U. S., 113.

Tindel *v.* Wesley, 167 U. S., 219.

Warner *v.* New Orleans, 167 U. S., 475.

Smythe *v.* Ames, 169 U. S., 519.

Fitts *v.* McGhee, 172 U. S., 529.

Illinois Central R. R. Co. *v.* Adams, 180 U. S., 28.

Missouri R. R. Co. *v.* Missouri R. Com'rs, 183 U. S., 53

International Postal Supply Co. *v.* Bruce, 194 U. S., 611.

The complainant Cotton has sought the protection of the doctrine laid down by this court in these cases. He asks no affirmative relief against the State and does not name it as a defendant; he does not seek to prevent the payment of any sum due the State; but on the contrary he has tendered himself as ready and willing to deliver to the State its property—the warrant—when his lien thereon has been secured or satisfied. When ex-Governor Bates, by his unlawful demand of Secretary Shaw, sought to invade Mr. Cotton's rights under his contract with the State and deprive him of his property in the warrant, he "*judicially resisted*" such unwarranted action by filing this bill for relief against the Governor and the Secretary.

In the Pennoyer case the principles of *Hans v. Louisiana* were quoted with approval and amplified as follows:

> "Little remains to be done or said by us in this connection, except to apply the principles announced in earlier cases to the case before us. It must be borne in mind that this suit is not nominally against the governor, secretary of state and treasurer, as such officers, but against them collectively, as a board of land commissioners.
>
> "It must also be observed that the plaintiff is not seeking any affirmative relief against the State or any of its officers. He is not asking that the State be compelled to issue patents to him for the land he claims to have purchased, nor is he seeking to compel the defendants to do and perform any acts in connection with the subject-matter of the controversy requisite to complete his title. All that he asks is that the defendants may be restrained and enjoined from doing certain acts which he alleges are in violation of his contract made with the State when h

purchased his lands. He merely asks that an injunction may issue against them to restrain them from acting under a State statute alleged to be unconstitutional, which act will be destructive of his rights and privileges, and will work irreparable damage and mischief to his property rights. The case cannot be distinguished in principle from Osborn & Bank and other cases cited, and the reasoning in those cases applies with equal force to this. * * *

"We think it clearly demonstrated from the authorities above referred to that the relief prayed can be granted, if, as contended, the legislation of the State under which the defendants are assuming to act is unconstitutional in that it operates to impair the obligation of a contract."

In the Pennoyer case the acts attempted or threatened by the State officers were justified by a claim of authority based upon *a statute*, but were enjoined because they invaded private rights and the authorizing statute was unconstitutional; but surely no other result could justly be reached in a case where the acts complained of equally invaded private rights under a claim of authority wrongly based upon the *common law*, or arbitrarily asserted without *any authority of law*.

The basis of right to an injunction in such cases is the illegal invasion of private right by a public officer under color of his office, and it can make no difference in principle whether he justifies his wrongful act under a special statute or under an unfounded claim of authority from the common law.

And if it be said that the Federal Constitution secures the citizen protection against *State statutes* impairing the

obligation of contracts, by a guarantee which does not extend to State action outside of an express statute, then it is equally true that by the 5th and 14th amendments to the Constitution it is ordained "that no person shall be deprived of life, liberty or property without due process of law," and this prohibition expressly extends to and includes the States.

Now, the complainant has a vested property right in the particular Treasury warrant, and the fund represented thereby, delivered to him as agent of the governor of Massachusetts by the Secretary of the Treasury, and his property right in that warrant consists of a lien thereon, attaching by virtue of his lawful possession thereof; and if, because of a controversy thereafter arising between the governor of Massachusetts and his agent, the complainant, the Secretary of the Treasury, destroys the value of that lien by the arbitrary issue and payment of a second warrant for the same debt, he thereby deprives the claimant of his property without due process of law.

If the Secretary of the Treasury or the governor of Massachusetts assumed to imprison the complainant under color of authority from his office, can it be doubted that the Federal courts could inquire into that imprisonment, and, if the same were found to be wrongful, release the complainant therefrom by a writ of *habeas corpus* based upon this very constitutional provision? And if this constitutional guarantee enables the courts to protect the *liberty* of the *citizen* from illegal acts of Government officers, does it not enable them to protect his property as well?

The suit is in the nature of a proceeding in rem against property under the control of the court below.

If it should be considered that the effort to establish a lien upon the warrant, and to enjoin the threatened action of the Secretary of the Treasury in issuing a new warrant renders this proceeding in effect a suit against the State of Massachusetts, then we submit that it falls within the well-established exception to the general rule prohibiting actions by an individual against a sovereign State, hereinafter set forth.

For while it is everywhere settled law that a sovereign cannot be sued in a court of justice without his consent, and that where you cannot sue a sovereign directly by a proceeding *in personam*, you cannot reach him indirectly by a proceeding *in rem*, there are various exceptions to this general principle, which are fully established by authority in this court and illustrated by numerous legal analogies.

Among these exceptions is the case arising when property belonging to a sovereign comes within control of the court without its compulsory preliminary process, either by the voluntary act of the sovereign or by the voluntary act of an individual having lawful possession of such property and asserting a right therein as against the sovereign. In such a case the court will perform its duty in respect of such property as if the owner thereof were suable. Similarly we find courts everywhere taking jurisdiction of all manner of controversies by virtue of having control of property belonging to persons over whom they have no control.

The most familiar examples of such jurisdiction are cases of ordinary attachment or condemnation of property, where the defect of personal jurisdiction is due to a physical fact,

as the non-residence of the defendant or the evasion of process by a resident defendant; but the same principle has been frequently applied in this court where the defect of personal jurisdiction is due to a legal doctrine, as the exemption of a sovereign from suit.

It is not contended for a moment that a bill of complaint, based on the contract between Mr. Cotton and the State of Massachusetts, would lie at the suit of Mr. Cotton against the State in any case where the compulsory preliminary process of the court was required against the officers of the State *in personam* or against the fruit of the contract *in rem*.

Such compulsory preliminary process cannot properly issue, but if, in the regular course of judicial administration the court acquires jurisdiction of the subject-matter in controversy, either *in personam* by the voluntary act of the sovereign defendant, or *quasi in rem* by the voluntary act of the plaintiff in bringing into court the property of the defendant lawfully in his possession, then the court will perform its duty in the premises and treat the sovereign, so far as such property is concerned, like any other party litigant.

So in the case of *Chamberlin vs. St. Paul Railroad Company*, 92 U. S., 306, this court, in passing upon a controversy involving the rights and remedies of an individual against a State, said:

> "When property passes to the State, subject to a specific lien or trust created by law or contract, such lien or trust may be enforced by the courts whenever the *property* comes under their jurisdiction and control."

And it would be difficult, indeed, to describe the exact situation now presented to the court more aptly or more concisely than is done by the above language of Mr. Justice Field.

And, again, in the case of *Christian v. Atlantic & N. C. Railroad Company*, 133 U. S., 244, this court while asserting the general rule

> " * * * that a bill will not lie to effect a foreclosure and sale, *or to obtain possession of property belonging to the State*; and for the very plain reason that, in such a case, the State is a necessary party and cannot be sued "—

yet the court also recognized the exception to the general rule upon which we are now relying, as follows (page 243):

> "There is a class of cases, undoubtedly, in which the interests of the State may be indirectly affected by a judicial proceeding without making it a party. Cases of this sort may arise in courts of equity where property *is brought under its jurisdiction for foreclosure or some other proceeding*, and the State, not having the title in fee *or the possession of the property*, has some lien upon it, or claim against it, as a judgment against the mortgagor, subsequent to the mortgage. In such a case the foreclosure and sale of the property will not be prevented by the interest which the State has in it; but its right of redemption will remain the same as before. Such cases do not affect the present, in which the object is to *take and appropriate* the State's property for the purpose of satisfying its obligations."

So, again, in the case of *Cunningham v. Macon & Brunswick Railroad Company*, 109 U. S., 451, the court, speaking through Mr. Justice Miller, says:

> "This principle is conceded in all the cases, and whenever it can be clearly seen that the State is an indispensable party to enable the court, according to

the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But in the desire to do that justice, which in many cases the courts can see will be defeated by an unwarranted extension of this principle, they have in some instances gone a long way in holding the State not to be a necessary party, though some interest of hers may be more or less affected by the decision. In many of these cases the action of the court has been based upon principles whose soundness cannot be disputed. A reference to a few of them may enlighten us in regard to the case now under consideration.

"It has been held in a class of cases where property of the State, or property in which the State has an interest, comes before the court and under its control, in the regular course of judicial administration, without being forcibly taken from the possession of the Government, the court will proceed to discharge its duty in regard to that property. And the State, if it choose to come in as plaintiff, as in prize cases, or to intervene in other cases when she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court. Of this class are the cases of *The Siren*, 7 Wall., 152, 157; *The Davis*, 10 Wall., 15, 20; and *Clark v. Barnard* and others, 108 U. S."

The same principle is firmly established by numerous decisions of this court in admiralty cases bringing up for review proceedings *in rem* or *quasi in rem*.

So in the case of *The Siren*, referred to in *Cunningham v. Railroad Company, supra*, it is said that—

"A claim for damages *exists* against a vessel of the United States guilty of a maritime tort, as much as if the offending vessel belonged to a private citizen. And although the claim cannot be *enforced* either by direct suit against the United States or by direct proceeding *in rem* against the vessel, yet if the property itself against which the claim exists *gets within the control and jurisdiction* of the courts, through the act of the United States, then the claim against the same will be recognized and enforced."

* * * * * * *

"* * * the existence of a claim, and even of a lien upon property, is not always dependent upon the ability of the holder to enforce it by legal proceedings. A claim or lien existing and continuing will be enforced by the courts *whenever the property upon which it lies becomes subject to their jurisdiction and control.* Then the rights and interests of all parties will be respected and maintained."

The Siren, 7 Wall., at p. 158.

Approved in *Carr v. United States*, 98 U. S., at p. 438.

"The cases in which public property may be subjected to claims against it are those in which it is, by the act of the Government, in juridical possession, *or has become so without violating the possession of the Government*, and the latter seeks the aid of the court to establish or reclaim its rights therein. In such cases it is equitable that the prior rights of others to the same property should be adjudicated and allowed."

Carr v. United States, 98 U. S., 433.

Personal property of the United States on board of a vessel for transportation is liable to a lien for salvage services rendered in saving the property.

Such a lien cannot be enforced by a suit against the United States, nor by a proceeding *in rem when the possession of the property* can only be had by *taking it out of the actual possession of the officers or agents of the Government.*

But it may be enforced by a proceeding *in rem* when the process of the court does not disturb the possession of the Government, which, being thus compelled to appear in court to assert its claim, must discharge the lien before the property will be delivered to it.

Proceedings *in rem* to enforce a lien against property of the United States are only forbidden where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court.

The Davis, 10 Wall., 15.

United States v. Morgan, 99 Fed. Rep., 573.

> "In cases of general average, the master or owner of the ship has a lien upon all goods in the ship for a proportionate contribution toward the average.
>
> "There is no exception to this general rule in favor of the United States or any other government or sovereignty, although there may be cases of contract, where liens upon the property of governments do not attach, as on that of private persons.
>
> "Sovereignty does not necessarily imply an exemption of all the sovereign's property from the process and jurisdiction of courts of justice, and it is a fair inference from the duties of a sovereign, that where a lien exists upon property under general principles of justice, that lien should be presumed to be admitted and protected by every sovereign, until the presumption is repelled by some positive edict to the contrary. No such edict exists in the United States and I cannot but think that public policy will be promoted, and

not impugned, by holding that the remedy for the reward in general average is not uncertain and precarious, but attaches as a lien, primarily *in rem*, and does not await the slow, or tardy, or distant justice of the Government in awarding it."

Story, J., in *United States v. Wilder*, 3 Sumn., 308; 28 Fed. Cases, 604.

And in this case Judge Story quotes with approval the opinion of Vattel respecting the enforcement of rights against a sovereign, as follows:

"If there exists any difficulty on this account, it is equally conformable to prudence, to the delicacy of sentiment which ought to be conspicuous in a sovereign, and to the love of justice, to cause them to be decided by the tribunals of the State. This is the practice of the States that are civilized and governed by laws."

As to the Joinder of the Secretary of the Treasury.

This suit cannot be regarded as one against the State of Massachusetts because of the joinder of the Secretary of the Treasury as a defendant. Mr. Cotton does not seek to compel the Secretary of the Treasury to pay over to him any funds of the State of Massachusetts or to restrain the Secretary from paying to that State any sum that may be justly due to it by the United States. The suit is simply and solely an action to prevent the Secretary from doing or attempting to do anything that will disturb Mr. Cotton's lien upon the warrant in his possession. The case does not come within the principle announced in *United States v. Guthrie* (17 How., 284), that "no court has the power to command the

withdrawal of money from the Treasury of the United States to pay any individual claim whatever." This is an action to restrain the Secretary of the Treasury from violating a ministerial duty and attempting to do a ministerial act which he has no authority under the law to do.

Under the act of Congress approved July 27, 1861, the Secretary of the Treasury was directed—

> "* * * out of any money in the Treasury not otherwise appropriated *to pay to the governor of any State, or to his duly authorized agent*, the costs, charges and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying and transporting its troops employed in aiding to suppress the present insurrection against the United States to be settled upon proper vouchers to be filed and passed upon by the proper accounting officers of the Treasury."

Every requirement of this explicit and comprehensive statute had been fully met and complied with before the Secretary of the Treasury was authorized to perform any act relating to the payment of the amount found due. After the amount due to the State of Massachusetts had been ascertained and settled upon proper vouchers, nothing but a ministerial duty remained to be performed by the Secretary namely, that of issuing a warrant upon the Treasurer of the United States to the governor or to his duly authorized agent.

United States *v.* Jordan, 113 U. S., 418.

United States *v.* Louisville, 169 U. S., 249, 255.

Roberts, Treasurer, *v.* United States, 176 U. S., 221, 230.

In the last case the court said, speaking of the act of Congress therein involved:

> "There is but one act of Congress to be examined, and it is specially directed to the Treasurer. We think its construction is quite plain and unmistakable. It directs the Treasurer to pay the interest on the certificates which had been redeemed by him, and the only question for him to determine was whether these certificates had been redeemed within that meaning of that act. That they were, we have already attempted to show, and the duty of the Treasurer seems to us to be at once *plain, imperative, and entirely ministerial*, and he should have paid the interest as directed in the statute."

With the act of delivering the warrant to Mr. Cotton, terminated not only all manner of responsibility upon the part of the Secretary of the Treasury relating to the payment, but also completely ended his authority in the matter. Upon the delivery of this warrant to Mr. Cotton the Secretary of the Treasury became, with respect to this transaction, *functus officio*.

Had the Secretary at the request of ex-Governor Bates issued a new warrant he would not only have destroyed Mr. Cotton's lien upon the warrant already issued, but would have committed an act for which there was no authority in law.

This court has repeatedly held that any one who sustains personal injury by the refusal of an executive officer to comply with his duty may have a writ of mandamus to compel him to perform his duty, or when such duty is about to be violated by some positive ministerial act for which there is

no adequate compensation at law he may have an injunction to prevent it.

> Board of Liquidation *v.* McComb, 92 U. S., 531, 541.
> Noble *v.* Logging Co., 147 U. S., 165, 172.

Furthermore, the Secretary of the Treasuary derives his power to issue duplicate warrants from section 3646 of the Revised Statutes as amended by the act of 1885, which reads as follows:

> "Whenever any original check is lost, stolen, or destroyed, disbursing officers and agents of the United States are authorized, after the expiration of six months, and within three years from the date of such check, to issue a duplicate check; and the Treasurer, assistant treasurers, and designated depositaries of the United States are directed to pay such duplicate checks, upon notice and proof of the loss of the original checks, under such regulations in regard to their issue and payment, and upon the execution of such bonds, with sureties, to indemnify the United States, as the Secretary of the Treasury shall prescribe. This section shall not apply to any check exceeding in amount the sum of twenty-five hundred dollars."

This section limits the right to issue a duplicate warrant to cases where the original has been lost, stolen, or destroyed, and only then in cases where the amount does not exceed $2,500. It is also possible that the Secretary might have the power to correct a clerical error in a warrant which had been erroneously made out, but that is not this case. The warrant was properly made out and properly delivered in accordance with the statute that authorized the payment.

The Abatement of the Suit as to the Defendant Bates.

The court will probably take judicial cognizance of the fact that the defendant Bates relinquished his office as governor of Massachusetts, and that his successor, Governor Douglas, assumed the duties of that office on or about the 6th day of January, 1905, subsequent to the day when the rule in this case was issued. Under the decisions of this court in *Warner Valley Stock Company v. Smith* (165 U. S., 28) and *Murphy v. Utter* (186 U. S., 95), the action sought to be prohibited, so far as Bates is concerned, has therefore abated and cannot be revived against his successor in office.

We think we have shown the contention that this is a suit affecting the property of the State, and therefore a suit against the State, to be without merit. The only remaining ground for asserting that it is a suit against the State grows out of the joinder of the defendant Bates in his individual or official capacity. The only object in joining Mr. Bates was to prevent him as an individual clothed with gubernatorial powers from doing an act to the injury of Mr. Cotton. Now that he has been shorn of his official power his capacity for injury is at an end, and, under the decisions above referred to, his connection with the litigation is terminated and the suit cannot be revived against his successor in office. With the passing of Mr. Bates disappears the only remaining objection which can be interposed to the jurisdiction of the court below.

It is respectfully submitted that the prayer of the petition of the Commonwealth of Massachusetts should be denied.

FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,
WILLIAM HITZ,
WILLIAM FRYE WHITE,
Attorneys for ~~John D. Collon.~~
Respondents

Supreme Court of the United States.

No. 15, Original.—October Term, 1904.

Ex parte: In re The Commonwealth of Massachusetts, Petitioner.

[April 10, 1905.]

By an act of Congress of the United States approved July 27, 1861, (12 Stat. 276, c. 21,) it was provided:

"That the Secretary of the Treasury be, and he is hereby, directed, out of any money in the Treasury not otherwise appropriated, to pay to the governor of any State, or to his duly authorized agent, the cost, charges, and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers, to be filed and passed upon by the proper accounting officers of the Treasury."

On March 20, 1888, the legislature of Massachusetts passed the following resolution:

"*Resolved*, That the governor and council are hereby authorized to employ the agent of the Commonwealth for the prosecution of war claims against the United States, to prosecute also the claim of the Commonwealth for a refund of the direct tax paid under act of Congress approved August fifth in the year eighteen hundred and sixty-one, and of the interest paid upon war loans during the period from eighteen hundred and sixty-one to eighteen hundred and sixty-five, also to fix his compensation which shall be paid out of any amount received therefrom."

On July 12, 1899, the executive council of the Commonwealth passed a resolution authorizing the attorney general to employ John B. Cotton to prosecute said claim. Mr. Cotton was a citizen of the District of Columbia.

Thereupon a form of contract was prepared and executed by the then governor of Massachusetts, in behalf and under the seal of the Commonwealth, and by Cotton; and a duplicate original thereof was deposited with the Secretary of the Treasury of the United States.

The prosecution of the claim was at once entered upon, and after five years was finally adjudicated, audited and passed.

On or about May 2, 1904, the Treasury Department issued and delivered to Cotton, as the duly authorized agent of the Commonwealth of Massachusetts, war settlement warrant No. 11343, payable "to the governor of the State of Massachusetts, or order," for the sum of $1,611,740.85, and

addressed "P. O. address, c. o. John B. Cotton, agent and att'y, Washington, D. C."

Mr. Cotton notified the State attorney general of the delivery of the warrant to him, and that he was entitled to a lien upon the warrant for the amount of his fees under his contract; and the governor was informed to the same effect. Mr. Cotton also notified the Secretary of the Treasury that he claimed a lien upon the warrant for compensation in accordance with his contract. Subsequently, the governor, Hon. John L. Bates, addressed a communication to the Secretary of the Treasury, in which he demanded that the warrant be cancelled and that a duplicate thereof be forwarded to him as governor of the Commonwealth. The Secretary declined to comply with the demand. Later Mr. Cotton filed a bill in the Supreme Court of the District of Columbia against "Leslie M. Shaw, Secretary of the Treasury, and John L. Bates, Governor of the Commonwealth of Massachusetts," in which he asserted his right to an attorney's lien upon the papers of his client, the Commonwealth of Massachusetts, including the warrant in question, and prayed, among other things, that said Leslie M. Shaw might be restrained and enjoined from cancelling the warrant which had been delivered to him, and from drawing or issuing a duplicate thereof to said Bates, and "that the defendant, John L. Bates, may be restrained and enjoined from asking, demanding or receiving from the defendant, Leslie M. Shaw, or any of his assistants, subordinates or clerks, a second or duplicate warrant as aforesaid."

The State of Massachusetts was not named as a party to this suit, and no relief was prayed against the State.

Upon the filing of this bill one of the justices of the Supreme Court of the District of Columbia entered a rule on the Secretary of the Treasury, requiring him to show cause why the relief prayed against him should not be granted, which was duly served, but has not yet come on for hearing. No process was served upon defendant Bates, who has since ceased to be governor, and he has never appeared in the suit, nor has the Commonwealth of Massachusetts intervened therein in any way.

The Commonwealth of Massachusetts then filed a petition in this court, on leave, for writs of prohibition, mandamus, and certiorari, to restrain the justices of the Supreme Court of the District of Columbia from taking further proceedings or entertaining jurisdiction in the equity suit.

In response to a rule entered on that petition, the Chief Justice and Associate Justices of the Supreme Court of the District of Columbia showed cause, and submitted, for reasons set forth, that, as the case stood, the court ought not to be prevented from exercising jurisdiction.

Mr. Chief Justice FULLER delivered the opinion of the Court:

This court has no original jurisdiction over this controversy, in any view, because it is not a controversy between a State and a citizen of another

State. *Hepburn* v. *Ellzey*, 2 Cranch, 445; *Hooe* v. *Jamieson*, 166 U. S. 395. And it has not appellate jurisdiction, because since the passage of the act of February 9, 1893, 27 Stat. 434, c. 74, establishing the Court of Appeals for the District of Columbia, this court, generally speaking, and not including cases arising under the bankruptcy law, *Audubon* v. *Shufeldt*, 181 U. S. 575, cannot review the judgments and decrees of the Supreme Court of the District, directly by appeal or writ of error.

By section 716 of the Revised Statutes, this court and the Circuit and the District Courts "have the power to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

By section 688, prohibition may issue "to the District Courts when proceeding as courts of admiralty and maritime jurisdiction," but there is no similar provision in respect of other courts. And it has been repeatedly held, as to the Circuit Courts, that they have no power under section 716 to issue writs of prohibition and mandamus, except when necessary in the exercise of their existing jurisdiction. *Bath County* v. *Almy*, 13 Wall. 248; *McClung* v. *Silliman*, 6 Wheat. 601.

This is equally true of this court, that is to say, that in cases over which we possess neither original nor appellate jurisdiction we cannot grant prohibition or mandamus or certiorari as ancillary thereto.

Rule discharged; petition denied.

True copy.

Test:

Clerk Supreme Court, U. S.